

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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LINDEN CARE, LLC,

Plaintiff,

vs.

1:15-CV-1335

EXPRESS SCRIPTS, INC.,

Defendant.

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Evidentiary Hearing - November 20, 2015

James Hanley Federal Building, Syracuse, New York

HONORABLE BRENDA K. SANNES

United States District Judge, Presiding

*Eileen McDonough, RPR, CRR
Official United States Court Reporter
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1 (Court convenes at 10:14.)

2 THE CLERK: Case is Linden Care versus Express
3 Scripts, 15-cv-1335. Counsel, please note your appearance
4 for the record.

5 MS. CLARK: Your Honor, Linda Clark for the
6 plaintiff Linden Care, from Barclay Damon.

7 MR. COST: Good morning, Your Honor. David Cost on
8 behalf of Linden Care, also from Barclay Damon.

9 MR. ASHE: Lawrence Ashe from Boise Schiller for
10 the plaintiff.

11 MR. WIDNELL: Nicholas Widnell, Boise Schiller, for
12 the plaintiff.

13 MR. MURPHY: Joseph Murphy with Barclay Damon on
14 behalf of the plaintiff Linden Care.

15 MS. HELLMAN: Good morning, Your Honor. Sarah
16 Hellman from Husch Blackwell on behalf of Express Scripts.

17 MR. SMITH: Good morning, Your Honor. Christopher
18 Smith from Husch Blackwell on behalf of Express Scripts.

19 MR. SULLIVAN: John Sullivan from Cozen O'Connor
20 for Express Scripts.

21 MS. BAUMANN: Urmila Paranjpe Baumann for Express
22 Scripts.

23 THE COURT: Good morning, Counsel. We're here on
24 the pending motions. And at the outset let me just clarify
25 which motions are pending. Ms. Hellman, I know that in our

1 oral telephone conference you withdrew a motion to transfer
2 based upon the forum selection agreement, is that correct?

3 MS. HELLMAN: That is correct, Your Honor.

4 THE COURT: And are you also withdrawing your
5 request for sanctions related to that forum selection
6 agreement?

7 MS. HELLMAN: Yes, Your Honor.

8 THE COURT: And are you also withdrawing your
9 motion to dismiss the complaint in light of the amended
10 complaint?

11 MS. HELLMAN: Yes, Your Honor. I'm sorry, I was
12 just thinking back to that motion. Yes, Your Honor.

13 THE COURT: So pending for the defendant is the
14 motion to transfer this case to Missouri based upon the
15 argument that the parties agreed to arbitrate in Missouri?

16 MS. HELLMAN: That is correct, Your Honor.

17 THE COURT: And for the plaintiff's pending we have
18 the motion for a temporary restraining order and a
19 preliminary injunction?

20 MS. CLARK: That's correct, Your Honor.

21 THE COURT: And I should note that we have
22 received, the Court has obviously received the affidavits and
23 the exhibits filed in support of the parties' positions, so
24 we have that before the Court. Do the parties wish to
25 present any evidence with respect to the motions that are

1 pending. Ms. Clark?

2 MS. CLARK: Yes, Your Honor.

3 THE COURT: And Ms. Hellman?

4 MS. HELLMAN: Yes, Your Honor.

5 THE COURT: So why don't I let, Ms. Clark, you
6 proceed with your first witness.

7 MS. CLARK: Your Honor, I have a brief opening
8 statement, if I may.

9 THE COURT: Yes.

10 MS. CLARK: Would that be appropriate?

11 THE COURT: Yes.

12 MS. CLARK: Your Honor, is it okay if I stay here
13 rather than go to the podium since I have all my documents
14 here?

15 THE COURT: That's fine.

16 MS. CLARK: Good morning, Your Honor. We're here
17 today at what at first blush might be viewed as a rather
18 routine and simple type of breach of contract case. But
19 we're here today really because this is not a case involving
20 a breach of contract over the sale of widgets or anything
21 like that. Rather, this is a breach of contract case that
22 has far reaching implications both for New Yorkers and the
23 managed care system in New York, the rights of pharmacies and
24 pharmacists in New York.

25 More immediately, it's a case that immediately and

1 has impacted even over the last few days the lives of the
2 thousands of people that are currently under Linden Care's
3 care. This is very important. Linden Care has over 100,000
4 patients a year that it is responsible for. Today with
5 respect to ESI alone it has the care of thousands of
6 individuals that are currently expecting their medications to
7 come from Linden Care. So this is an issue of great moment
8 not just for the parties but for many people out there.

9 Now, I want to start just briefly giving a little
10 bit of an overview. We've gone back and forth, we've had a
11 lot of briefing, but I wanted to set forth the context that
12 we have here with respect to Linden Care specifically. The
13 Court has heard a lot about Linden Care as a specialty
14 pharmacy. And I think we need to start by talking a little
15 bit about what that is.

16 Linden Care is a licensed pharmacy in Woodbury,
17 New York. It has a retail pharmacy, you can walk in and hand
18 in your prescriptions. There are eight pharmacists there
19 that work to dispense medications. But more particularly for
20 the facts of this case, Linden Care specializes in the
21 provision of pain management medications. This is an
22 important fact. Because pain management medications in this
23 day and age are very highly regulated. They're very
24 carefully provided and shipped by manufacturers. They're not
25 readily available. They require a very high level of care,

1 both with respect to interacting with patients because of the
2 very high risks that are involved.

3 The patients are special. The patients are special
4 because they're suffering from extreme pain conditions. Your
5 Honor, we're not talking about a headache, the types of
6 conditions that you and I might encounter on a daily basis
7 with our family members. We're talking about patients in
8 extremis. We're talking about end of life care for, for
9 example, some of the affidavits that we provided just
10 yesterday or the last few days, who are suffering from stage
11 4 lymphoma, stage 4 throat cancer. These are the types of
12 medications that are keeping these people pain free in these
13 very difficult circumstances.

14 This is important because we're talking about
15 breakthrough pain, pain that in many cases, I'm not saying
16 this is all of Linden Care's patients, but it's not atypical,
17 that can't be managed through over-the-counter prescriptions
18 and sometimes not even through traditional narcotics. Many
19 of these patients need to go to Linden Care because Linden
20 Care has a very specialized federally approved program to
21 dispense very, very potent TIRF REMS type of medications.
22 They're very effective. They have an immediate impact on
23 breakthrough pain, however, they're extremely potent and they
24 can be very dangerous.

25 You're going to hear about this. This is very

1 important because patients, for example, can't just go out
2 and take TIRF REMS drugs, they could die from that. There
3 has to be a very gradual escalation in dosage and very close
4 coordination with the physician and the patient to make sure
5 that someone becomes tolerant, their system can tolerate that
6 drug. Once they're on it, they can't be immediately -- they
7 can't immediately cease taking that medication or they suffer
8 from potentially not only the immediate return of this
9 extreme pain condition, but also from potentially life
10 threatening consequences such as tachycardia, heart
11 arrhythmia, all kinds of serious withdrawal symptoms,
12 sweating, anxiety. These people are not in a position to be
13 put through that. So that's a very important part of this
14 case is the nature of Linden Care's responsibilities.

15 Now the drugs are special, as I said, because
16 they're difficult to get and they're difficult to get from
17 manufacturers. You can't go to your local pharmacy and get
18 the typical class of narcotics or highly regulated TIRF REMS
19 drugs that are provided by Linden Care to their population,
20 they're just not available. You're going to hear about that.
21 You're going to hear from Dr. Weingarten, who is a physician
22 with expertise specifically in this area. You're going to
23 hear from Mr. Fogel, who is a pharmacist at Linden Care,
24 about why there is this difficulty for prescribers finding a
25 pharmacy that has all these qualifications and the resources

1 to effectively manage these medications safely.

2 The other part of it, Your Honor, is the regulatory
3 backdrop. We have the ISoP program in New York that you
4 might be familiar with. The ISoP program very carefully
5 controls now the availability of narcotics, both for patients
6 so they don't overdose, but also so they don't end up on the
7 street as an effort by New York State to control the epidemic
8 of narcotics on the street. You'll hear more about that.

9 Linden Care is regulated through the FDA, the TIRF
10 REMS program. And you'll hear about the alphabet soup;
11 they're regulated by the DEA, they're regulated by the New
12 York State Bureau of Narcotic Enforcement, the BNE. You'll
13 hear about this very complex web of regulation that makes
14 Linden Care special and specially situated to take care of
15 these patients with these unique problems.

16 Now, one of the things that we have to know here
17 when we're talking about Linden Care's specialty in pain
18 management is also that these drugs may be expensive, and so
19 it constantly puts Linden Care in working with its patients,
20 in working with prescribers in establishing a flow of
21 products from manufacturers in the position of advocating for
22 its patients. The patients come to Linden Care with a
23 prescription from a prescriber. It's the prescriber that
24 decides if the patient can get plain old Ibuprofen, something
25 over-the-counter, or should they be getting something that is

1 more unique and specialized for their condition? Should they
2 be getting a narcotic? Do they qualify for these TIRF REMS
3 products? That's uniquely a physician determination.

4 Then the patient has to be evaluated with respect
5 to their formulary. The doctor doesn't decide what the
6 patient actually gets; the doctor writes the prescription.
7 And, frankly, the pharmacy benefit manager doesn't decide
8 what the patient gets; it's the patient's plan. For you or
9 for me in upstate New York that might be MVP or CDPHP. Every
10 plan has its own menu of drugs that it is approved through
11 its own clinical determination, perhaps in consultation with
12 the pharmacy benefit manager. But every plan has its own
13 menu of drugs that are available. And it's part of Linden
14 Care's function and part of this full service that it
15 provides to assist and coordinate, help the patient navigate
16 what can be a complicated process with the pharmacy benefit
17 manager to ensure or prepare to help them get the approvals
18 they need in order to get the drug that their doctor has said
19 is what they need. Okay. The doctor can prescribe generics
20 or not, that's not a Linden Care decision.

21 So Linden Care is constantly in this position of
22 potential conflict with its pharmacy benefit manager because
23 of its role as an advocate for the patients working with the
24 prescribers to get the drugs that they're entitled to under
25 their formulary, that they paid for in their monthly

1 premiums.

2 Why is that important here? Okay. It's important
3 here because what we're talking about is the disregard, ESI's
4 position that it is not bound by state laws generally and,
5 more specifically, that it's not bound by New York State laws
6 that protect patients, that protect prescribers for exactly
7 the reasons that are in play here. So sometimes in cases we
8 have a technical violation of a state regulation or a rule
9 but it's not terribly relevant to the case at hand.

10 I always think about the bar exam that I took where
11 there was a question about somebody speeding through a school
12 area when the school was not in session. They violated the
13 speed limit but school wasn't in session, so how relevant is
14 that. That's not what we have here. Here we have statutes,
15 4406-d, which is the provider rights statute; 4406-c, which
16 specifically promotes and preserves the provider's ability to
17 advocate for the patient. We have these statutes in play in
18 New York precisely because of this fundamental conflict of
19 interest that exists in the managed care system.

20 The pharmacy benefit manager is smack dab in the
21 middle of that equation. They're the ones that have the
22 spigot to determine if the patient is going to get that drug
23 or not based upon the plan's formulary. So you have this
24 tension, and it's very important in this case to recognize
25 that because this is not an ancillary issue whether or not a

1 PBM can terminate without cause for technical noncompliance
2 with certain aspects of a 200 page Provider Manual. That is
3 not a free-standing issue. That issue has to be looked at
4 through the lens of New York's patient and provider
5 protection laws.

6 And why do we have these laws? Well, we have these
7 laws in New York, Rhode Island. I provided the Court with a
8 sampling of the fifty states, not an exhaustive treatment.
9 We have these laws precisely to protect patients and
10 providers, to free them up to advocate for the patients so
11 that the patients can get the drugs that they're entitled to
12 that they paid for from their plans. And that's really what
13 we're here about today.

14 Now in this case the PBM issue is even more central
15 to the quandary, and it's because the pharmacy benefit
16 manager, in this case Express Scripts, has multiple conflicts
17 of interest. It has this fiduciary responsibility to act in
18 the best interest of the plan it represents. Okay. PBM
19 doesn't decide what drugs the patients get, the plan does.
20 And the plan decides what they want pay for for the
21 formulary. But the PBM has a conflict of interest because
22 they get paid based upon a utilization compensation model. I
23 don't think there is going to be any dispute about this.
24 It's in the *Paduano* case, and I can provide plenty of
25 resources for the Court if there is any issue on that.

1 So if they are able to keep the cost down for the
2 plan and dispense from the lower end of the formulary, the
3 less expensive drugs, they make more money. That's a
4 problem. In addition, the pharmacy benefit manager makes
5 money on rebates. And that's really important here. So if
6 the pharmacy benefit manager is able to steer patients to
7 drugs where they have a favorable rebate relationship, they
8 make money that way too.

9 Now why is that relevant here? Well, we have the
10 back story here, okay, of the real reason why Linden Care was
11 terminated with no notice last Tuesday, with no notice to
12 patients, with no notice to the plans. The real reason they
13 were terminated, according to Express Scripts' own press
14 release, was because Express Scripts was upset that Linden
15 Care was too close to a particular manufacturer that was
16 dispensing, that involved the dispensing of expensive
17 medications. And the same day or about the same time that
18 Linden Care was terminated Express Scripts sued that
19 manufacturer, Horizon, you're going to hear quite a bit about
20 Horizon, for \$140 million for rebates that Express Scripts
21 felt that Horizon should have paid it.

22 So these conflicts of interest that are at the
23 heart of this case and are at the center, the very purpose of
24 New York's provider and patient protection laws, are a very
25 compelling reason to take a very careful look at the recited

1 bases for the termination that was issued last Tuesday. We
2 have the reasons that were cited in the termination letter
3 that we're going to talk about through our witnesses, and we
4 have the reasons that Express Scripts is citing to the media.
5 And we have this \$140 million rebate squabble between
6 Horizon, the manufacturer, and Express Scripts. So we have
7 every reason to take a hard look at this issue. Not to
8 mention the patient ramifications.

9 There is another conflict of interest here as if
10 there weren't enough. The other conflict of interest is that
11 in addition to being the administrator of the plan, that
12 conflict of interest because of the plan arrangement, in
13 addition to having the conflict of interest because they want
14 to get the best rebate arrangement possible, they're fighting
15 with Horizon about it now, they're also a major competitor.
16 They have -- they are talking about captive pharmacies.
17 Well, let's be very clear by the way, Linden Care is not
18 captive of anyone. There is no manufacture or anyone else
19 that owns any part of Linden Care. This situation has
20 absolutely nothing to do with other situations that the Court
21 may have heard about, and we're willing to establish that.
22 The problem, however, is that Express Scripts with all those
23 other hats puts one more hat on top as a major competitor of
24 Linden Care.

25 They do have a captive pharmacy. They have their

1 own captive pharmacy called Accredo, along with others by the
2 way. That's one. Accredo is one of the biggest pharmacies
3 in the country. And so they have another incentive, well, if
4 we have to prescribe these expensive medications on the top
5 end of the formulary, which is going to hurt our bottom line
6 because of our compensation arrangements, and maybe it's not
7 the greatest rebate situation for us, at least if it's going
8 to be prescribed, let's send it to Accredo, then at least we
9 get the profit and potentially the rebate consequences.

10 So we have this situation on so many levels that is
11 fraught with conflicts of interest. And when you look at the
12 termination letter issued by Express Scripts, we're talking
13 about highly debatable technical noncompliance with
14 provisions of this massive Provider Manual. Let's remember,
15 Your Honor, this Provider Manual has a provision to deal with
16 noncompliance. Okay. And that provision is Section 4.2(b)
17 of the Provider Manual, which we cite in our papers. And
18 that has the usual process for these kinds of things. Tell
19 us what we did wrong, okay, and we will come up with a plan
20 of correction, we have thirty days to cure the problem, and
21 that's how these issues get resolved.

22 That's not what Express Scripts did. Instead they
23 issued an instant termination without regard for the
24 provisions of 4.2(b) saying somehow that our violation was so
25 utterly egregious that it justified an immediate termination

1 in all of the consequences that we've seen over the last week
2 for patients.

3 Your Honor, we've been able to show, number one,
4 that they're just wrong, we were licensed in Maryland. We've
5 been able to show that, in fact, we have a sister pharmacy in
6 California that properly dispenses in California. What
7 they're really talking about, Your Honor, is an occasional
8 and very rare accommodation to a patient who happens to be in
9 California who needs an emergency or urgent refill of their
10 medication. I can't tell you today how that stacks up in
11 terms of a technical possible noncompliance in California,
12 but I can tell you in New York, for example, there would be
13 no action, there would be no enforcement or prosecution based
14 upon that good faith accommodation.

15 Lastly, we have the mail order issue. Well, Your
16 Honor, we're going to hear from our witnesses, experts and
17 Linden Care folks alike, who will tell you that in the
18 pharmacy world mail order means a very specific thing. Mail
19 order means Accredo. Okay. A massive central distribution
20 center without a retail brick and mortar pharmacy front that
21 involves long term prescriptions for chronic maintenance
22 drugs, like diabetes and things like that. That is the
23 traditional notion of mail order. And we did not breach
24 that. We were brought into the network as a retail pharmacy.
25 We disclosed that we do home delivery, okay, by overnight

1 mail. It's not necessarily the definition of mail order,
2 there is no definition really. There's no prohibition
3 against mail order in the contract. It doesn't say you can't
4 mail order.

5 THE COURT: Ms. Clark, why don't we proceed with
6 the witnesses. I do have a number of questions for both
7 counsel, but I think it would be helpful to the Court to
8 proceed with witnesses first and then argument and question
9 by the Court.

10 MS. CLARK: I was very close to being done. I
11 appreciate your indulgence. The only other issue that I did
12 not address and you may or may not want to hear about at this
13 point is my colleague Mr. Cost is prepared to deal with the
14 arbitration issues. Should we just dive into the evidence or
15 would you like to hear about that at all?

16 THE COURT: Let's dive into the evidence and we can
17 argue at the end.

18 MS. CLARK: Thank you, Your Honor.

19 THE COURT: Also I would just note for both parties
20 that the Court has read all of the affidavits that have been
21 submitted and the exhibits, so to the extent we need not kind
22 of retread everything, things that have been filed, that
23 would be helpful. And to the extent you could keep the
24 evidence tailored to the issues which are before the Court,
25 which are likelihood of success and irreparable harm and the

1 arbitration provisions, that would be very helpful.

2 MS. HELLMAN: Your Honor, if I could just before we
3 start, we saw their exhibit list and I'm to the sure how
4 they're planning to deal with that. There are some
5 confidential documents. The Provider Agreement, the Provider
6 Manual, the parties have agreed for it to be confidential. I
7 know there are certain provisions that are at issue here and
8 their exhibit list I think it's the complete copy unredacted.
9 So just before we get too far down this process, I would like
10 to just be able to address our concerns with the entire
11 Provider Agreement with the rate schedules, the entire
12 Provider Manual being admitted into the record.

13 THE COURT: I do have the redacted copies that were
14 provided that were filed with the Court, and I'm happy to
15 proceed with those unless there are other provisions that
16 need to be admitted into evidence.

17 MS. CLARK: Your Honor, I think we should proceed
18 on that basis. If there is another provision that comes up
19 that that's relevant, I think we can deal with that in real
20 time, that's fine with us.

21 MS. HELLMAN: Thank you.

22 THE COURT: Ms. Clark, would you call your first
23 witness?

24 MS. CLARK: Yes. Your Honor, plaintiff calls
25 Jordan Fogel.

Jordan Fogel - Direct - Ms. Clark

19

1 THE CLERK: State and spell your full name for the
2 record.

3 THE WITNESS: Jordan Fogel; J-O-R-D-A-N, F-O-G-E-L.

4 **JORDAN FOGEL**, called as a witness and being
5 duly sworn, testifies as follows:

6 *DIRECT EXAMINATION BY MS. CLARK:*

7 Q Good morning, Mr. Fogel.

8 A Good morning.

9 Q Can you state your name and where you work for the
10 record?

11 A My name is Jordan Fogel and I work at Linden Care
12 Pharmacy and I'm one of the pharmacists.

13 Q Where is Linden Care Pharmacy?

14 A Woodbury, New York.

15 Q And how long have you worked there?

16 A I've been there since day one.

17 Q And when was Linden Care founded?

18 A 2007.

19 Q And were you one of the founders?

20 A Yes, I am.

21 Q Mr. Fogel, can you give the Court just a very brief
22 recitation of your background as a pharmacist, in very
23 general terms?

24 A I went to Brooklyn College of Pharmacy, LIU College Of
25 Pharmacy, from 1978 to 1983.

1 Q And since then have you practiced as a pharmacist?

2 A Yes, I've been a pharmacist. I run several pharmacies
3 in Brooklyn. I actually bought my own pharmacy. And I
4 consulted to CVS and I worked for a couple different chain
5 stores.

6 Q And have you been at Linden Care since it opened, is
7 that correct?

8 A That's correct.

9 Q Can you tell us a little bit about Linden Care's
10 business and what kind of pharmacy it is?

11 A Linden Care is a specialty pharmacy, it is specialized
12 in pain management. We do controls, narcotics that are
13 highly regulated by different agencies. We do non-controls
14 also.

15 Q What is special about those kinds of drugs in terms of a
16 specialty pharmacy?

17 A Narcotics and controls are highly potent, some of them
18 belong to the TIRF REMS program, which we are in. It's
19 regulated by the FDA. Also all the other controls and
20 narcotics that we deal with are regulated by other agencies,
21 the DEA, Board of Pharmacy, the Drug and Narcotics
22 Enforcement, so they're very highly regulated.

23 Q We've heard a lot about the TIRF REMS program. Can you
24 just very briefly explain what that is?

25 A The TIRF REMS is a federal program run by the FDA where

1 the doctor has to sign a patient/prescriber agreement. It's
2 an agreement between a doctor and a patient that the drugs
3 will be properly stored. They're very dangerous. They can
4 only be prescribed for patients over 18 years old. They have
5 to follow directions accordingly.

6 The TIRF REMS is also a part of the pharmacy on our end
7 where we have to take a test to get into the program and we
8 have certain guidelines that we have to face. The patients
9 have to be opiate tolerant, the dosages have to be titrated
10 very slowly before we are able to start the drugs. The drugs
11 in the TIRF REMS program are all fentanyl products. The
12 fentanyl products are extremely potent and they're about 100
13 times more potent than morphine.

14 Q Are there a lot of pharmacies in your area or in
15 New York that have that program?

16 A There are some, not many. Many pharmacists shy away
17 from ordering these drugs because of their higher regulations
18 and all the administrative work that goes behind it, the
19 ordering, the stocking of the medications, the security of
20 the medication, and also cost, it's also very expensive.

21 Q When we're talking about costs, what would your order
22 for these kind of drugs or pain medications be on a weekly
23 basis at Linden Care?

24 A Well, I can tell you, I actually do the ordering for
25 these drugs and I'm not talking weekly, on a daily basis I

1 can order at least a million dollars a day, up to \$2 million
2 per day, and I keep about 2 to \$3 million in stock on hand
3 just in case there is a shortage.

4 Q So there is a huge investment involved?

5 A That is correct.

6 Q And can local pharmacies typically manage that kind of
7 investment?

8 A I don't believe so. Most pharmacies can't afford to do
9 it.

10 Q What kinds of patients does Linden Care serve?

11 A We serve oncology patients, different disease states,
12 multiple sclerosis, arthritis, any type of pain that's
13 secondary to a certain disease, could be trauma, could be a
14 vet, Armed Services.

15 Q And how many patients does Linden Care serve?

16 A Thousands.

17 Q On an annual basis could be hundreds of thousands?

18 A Hundreds of thousand, yes.

19 Q Today about how many patients from Express Scripts
20 specifically would be under Linden Care's care now?

21 A We have about 25 percent of Express Scripts' patients.

22 Q So that would be in the thousands?

23 A Yes.

24 Q And how many staff members are there at Linden Care?

25 A Well over a hundred.

1 Q And of those how many pharmacists are there?

2 A Eight.

3 Q And are all those pharmacists licensed in New York?

4 A Yes. Some are licensed in other states also.

5 Q And do they all live in New York?

6 A Yes.

7 Q One of the programs that Linden Care has to comply with
8 is the ISoP program. Are you familiar with that?

9 A Yes.

10 Q Tell the Court just very briefly what the ISoP program
11 is and how that impacts the way that Linden Care does
12 business?

13 A It prevents patients from doctor shopping so they can't
14 go from one pharmacy to another and get very potent narcotics
15 and sell them on the street, prevent street drugs. I,
16 myself, was actually one of the pharmacists involved in the
17 ISoP in 2012. I worked with the Attorney General's Office in
18 implementing the system. ISoP is also in several other
19 states but they have different names. Every state has their
20 own name for their ISoP. So it's an online tracking system
21 which you can see within 24 hours of where prescriptions are
22 filled, what pharmacy, and it also has the doctors also. It
23 is mandatory in New York State for doctors to check the ISoP
24 system; however, it is voluntary for pharmacists to check.
25 But in Linden Care we check every patient.

1 Q And in every state where you have access, correct?

2 A I, myself, actually have access in about 43 different
3 states, because we are licensed in 49 states, so I can access
4 all the different states and check. Some states or more, are
5 better than other states and you can check your toxicology
6 reports, you can check MRIs, you can check X-rays. Depends
7 on the state; every state has different levels of access.

8 Q So if I went to New Jersey and filled a prescription for
9 narcotics and then I went to New York and got a prescription
10 for narcotics, you would be able to see that in the ISoP
11 program?

12 A Yes. Sometimes I just check bordering states. If I see
13 a prescription isn't filled in New York and someone lives in
14 Staten Island, it's very easy to just drive over the bridge.

15 Q And is the voluntary compliance of Linden Care with the
16 ISoP program an important feature?

17 A Yes. Well, actually, I met with the Attorney General's
18 Office, we had a roundtable discussion, and it was my
19 intention to make it mandatory for pharmacists to check, and
20 I got a lot of backlash from the AMA, and actually my own
21 pharmacy organizations called me and gave me a hard time.

22 Q Now, when Linden Care fills a prescription, where does
23 the prescription come from? How does it come to Linden Care?

24 A It comes different ways. A patient can just walk in to
25 our retail pharmacy. The doctor can e-prescribe it,

1 electronically send it. New York passed the ISoP law, part
2 of the ISoP law they can electronically send a prescription
3 from any other state in the country and New York can accept
4 it. The doctor can mail it in. Those are the different
5 ways.

6 Q And what happens then to the prescription once it gets
7 to Linden Care?

8 A Then we start to process it.

9 Q When you say start to process it, do you have to
10 interact with the payer in any way to determine if there is
11 coverage?

12 A Yes. We have to enter all the patient information, all
13 the demographics. We enter the insurance information. We
14 adjudicate the claim and then electronically it will tell you
15 if it's paid, if it's not paid, what the copay is, if it
16 requires prior authorization.

17 Q And explain to the Court what prior authorization is.

18 A Prior authorization is when the insurance company will
19 hold on the claim and they would want some administrative
20 work done behind the scenes, so Linden Care would assist in
21 administrative work. We would have to fill out some
22 paperwork, send it to the insurance company and send it to
23 the doctor and then wait for approval. The approval usually
24 takes 24 to 72 hours. If it is approved, sometimes it's not.

25 Q And is that part of the services that Linden Care offers

1 to prescribers and patients to help them advocate for
2 themselves to get the drugs that the doctor has recommended?

3 A Yes. It's a free service that we do. That's why
4 doctors use us, they like that service, because doctors are
5 treating the patients and they don't have time to do the
6 prior authorizations.

7 Q And what about the patients, are they in need of that
8 kind of coordination of their medical benefits?

9 A Yes. Patients also appreciate the prior authorization
10 process that we do.

11 Q Is that sometimes the pain medication patients that have
12 to do with their condition?

13 A Yes, of course.

14 Q And so does Linden Care regularly have to interact with
15 the pharmacy benefit manager in connection with determining
16 whether or not there is coverage for a given drug?

17 A They interact different ways. They interact through the
18 computer, interact through telephone, could be through fax,
19 but there is constant communication with the PBM.

20 Q And the PBM, does it also conduct audits of Linden Care?

21 A Yes. Very often.

22 Q About how many audits a year does Linden Care field?

23 A It's hard a question to answer because there are fax
24 audits, there are telephone audits, there are in-house
25 audits, but I would say total per month could be three, four

1 per month.

2 Q So we're talking about dozens of audits every year by
3 the pharmacy benefit managers to make sure that Linden Care
4 is in compliance, correct?

5 A That is correct.

6 Q And all the documentation is provided during the audit
7 to the pharmacy benefit manager, right?

8 A Yes. It could be fax ordered, just have to fax it right
9 back. Could be verbal, answer some questions. Could be on
10 site. Or they can just send us a list and they just want all
11 documentation on a certain date and they'll come in-house and
12 check all documentation and verify it.

13 Q And look at all aspects of compliance with their plan
14 requirement, their contract requirements, correct?

15 A Yes.

16 Q And one of the items that they look at, do they look at
17 delivery information?

18 A All the time.

19 Q Explain to the Court what they're looking at when
20 they're asking for delivery information?

21 A Well, when we get an audit, they want to make sure that
22 the doctor write the exact amount, the dosing is correct, and
23 they're also going to ask for proof of delivery and
24 signature. And since we use FedEx, we just have a copy of
25 the FedEx signature along with the date that it was received.

1 Q So many times every year Linden Care is providing
2 Express Scripts as a PBM with a steady stream of information
3 about where the customers are located, where the patients are
4 located?

5 MR. SMITH: I'm going to object to leading the
6 witness. She's been doing it while, we've been letting it
7 pass, but this is getting a little bit extreme.

8 THE COURT: Overruled.

9 Q So Linden Care many times every year provides Express
10 Scripts with a stream of information about the patients,
11 where they're located and how they got the drugs in terms of
12 how they were delivered, correct?

13 A That's correct. It's Express Scripts and any other
14 order that we have.

15 Q And many of the ones that you're talking about would
16 have been Express Scripts, correct?

17 A That's correct.

18 Q About how much percentage of your business, do you know?

19 A Express Scripts I think is 25 percent.

20 Q So 25 percent of all those audits you described would
21 have been Express Scripts specifically?

22 A Yes.

23 Q And have you interacted in the past with the Express
24 Scripts auditors that come in to determine compliance?

25 A Not me. We have someone else in the company that deals

1 with the orders.

2 Q You've done that in the past?

3 A I used to do it in the beginning but I don't do it now,
4 in compliance.

5 Q And have you as part of your job at Linden Care, have
6 you heard about any complaints or audit findings at all
7 relating to a complaint by Express Scripts about the delivery
8 of prescriptions?

9 A No, not to my knowledge.

10 Q And Express Scripts can take back money, right, if they
11 feel that you've prescribed medication in error, right?

12 A Yes. It's called a charge back.

13 Q Charge back. If they think you violated their terms or
14 their contract provisions, they can take back the whole cost
15 of the prescription, right?

16 A Entire amount.

17 Q So the patient gets the drug, ingests the drug, and they
18 can still take it back. But they didn't do that with respect
19 to Linden Care's delivery of drugs to their patients at any
20 time?

21 A Not to my knowledge.

22 Q Now one of the aspects of Linden Care's specialty
23 pharmacy, does that involve communicating or counseling
24 patients?

25 A Yes.

1 Q And can you explain that function?

2 A We have eight pharmacists on staff, so if anyone has a
3 question, they will call and ask for a pharmacist, including
4 myself, and we'll talk to that patient and explain the safety
5 and side effects of different drugs that we're dispensing.
6 We have a separate consultation area.

7 Q And why is that important?

8 A It's part of the role of a pharmacist.

9 Q Does it have to do with patient safety?

10 A Patient safety, correct.

11 Q Is there something about the patients that Linden Care
12 serves that makes home delivery important?

13 A I'm not sure what you mean.

14 Q Well, you mentioned that these patients are critically
15 ill in many cases. Does that make home delivery especially
16 important in the pain management scenario?

17 A Yes. There are many patients that have debilitating
18 diseases and are bedridden. Some people have no limbs, so we
19 have to deliver prescriptions to them.

20 Q And last Tuesday did Linden Care receive a letter from
21 Express Scripts?

22 A Yes, they did.

23 Q And what did that letter say?

24 A We were terminated from the contract so we couldn't
25 process prescriptions.

1 Q And did that letter indicate that there was going to be
2 any notice provided to Linden Care so it could take care of
3 the patients that were processed?

4 A Not to my knowledge.

5 Q Did the letter indicate that there was going to be --
6 there had been any effort to communicate with patients that
7 Linden Care would be terminated?

8 A Not to my knowledge, no.

9 Q What was the impact on Linden Care's patients and upon
10 your relationship as a pharmacist with these patients when
11 that termination came through?

12 A The impact was pretty severe. We deal with very
13 critically ill patients who are in pain from several
14 different diseases, and when they heard they couldn't get
15 their medicine, they didn't know where to turn to. But we
16 stepped in and we supplied them with I'd say a seven day
17 supply of medications to hold them over until this was
18 resolved.

19 Q So until we got here today?

20 A Until today.

21 Q Those patients have had emergency fills?

22 A We have, yes. We call it culling over, we hold them
23 over for seven days because the pharmacist has a
24 corresponding responsibility to treat the patients, these
25 patients are suffering, and it's just moral, legal, ethical

1 thing to do.

2 Q And how much of its own funds has Linden Care had to
3 expend to bridge that gap between last Tuesday and today?

4 A I'm not on the financial side so I can't give you a
5 direct answer, but it has to be hundreds of thousands of
6 dollars.

7 Q Did you have any communication with providers? Did
8 Linden Care have communication with providers as a result of
9 this sudden termination? I'm sorry, prescribers.

10 A Oh, prescribers?

11 Q Right.

12 A Actually prescribers have called me, they were trying to
13 find out if they can use another pharmacy. There weren't
14 many pharmacies in the area that can accommodate patients.

15 Q Did you do any investigation about alternative
16 pharmacies that might be able to do what Linden Care does?

17 A Yes. There was a pharmacy, it was in the TIRF REMS
18 program, who wasn't too far away, it was called Village
19 Pharmacy. I think they were in Syosset or Plainview. I
20 called the pharmacy. I spoke to the owner and I spoke to the
21 pharmacist. I explained the situation. I asked him if he
22 could take on our patients and the Express Scripts patients,
23 and he said currently he only has two patients in the TIRF
24 REMS program, he would like to accommodate them but he
25 couldn't because he is not licensed in all the other states

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1 we were. He couldn't afford to order the TIRF REMS drugs
2 from his wholesaler either, and, frankly, he just didn't want
3 to stock it for safety and security.

4 Q And did you record that call?

5 A Yes.

6 MS. CLARK: And, Your Honor, that's in the docket.
7 I could play it, if you like. But there's a recording of
8 that call with Village Pharmacy in the docket that we have
9 previously submitted. It's eight minutes, it would take a
10 little bit of time, but I would be happy to put that up.

11 THE COURT: No, that's fine. Is that an exhibit
12 that you are admitting, seeking admission of?

13 MS. CLARK: Yes.

14 THE COURT: What exhibit number is that?

15 MR. COST: Your Honor, it's P17.

16 THE COURT: Any objection?

17 MR. SMITH: Yes, Your Honor. We have not received
18 this exhibit or had a chance to listen to it, has not been
19 provided to us.

20 THE COURT: For the record, the CD is currently
21 being provided to you?

22 MS. CLARK: That's correct.

23 THE COURT: And perhaps at a break you could listen
24 to it and you could tell the Court whether you have an
25 objection to the admission of this CD.

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1 MR. SMITH: Your Honor, I can't, I don't have a CD
2 player. Is there a device that I can listen to it on?

3 MR. COST: I can play it on my computer.

4 MR. SMITH: Thank you, Your Honor.

5 THE COURT: Right now P17 is not admitted into
6 evidence, but I'll ask defense counsel if they have any
7 objection at a later point.

8 MS. CLARK: And, Your Honor, as we go through
9 today, there are numerous exhibits that accompany affidavits
10 that are in the record. Is it the Court's expectation that
11 we would separately move all those exhibits into this
12 proceeding as evidence? I would be happy to do that. I just
13 wasn't sure how we were going to proceed.

14 THE COURT: Are you referring to exhibits that are
15 already in the record that have already been filed by one of
16 the parties?

17 MS. CLARK: Yes.

18 THE COURT: Those do not need to be admitted.

19 MS. CLARK: Okay. Thank you, Your Honor.

20 Q Did you have any discussions with prescribers about
21 whether or not they had been told before Tuesday or even
22 since then that Linden Care was being summarily terminated?

23 A Prescribers were not aware of the situation.

24 Q What about patients, did you have discussions with
25 patients about whether or not they were aware that there was

1 a termination of Linden Care?

2 A Patients weren't aware either.

3 Q And can you describe the concern of the patients that
4 you, that Linden Care heard from?

5 A Patients were extremely concerned. I believe they sent
6 in to our compliance department several e-mails. I didn't
7 read all the e-mails. I think they were given to my
8 compliance officer, where they cannot get the medications and
9 they just didn't know what to do.

10 Q And with respect --

11 A Or where to go.

12 Q And with respect to e-prescriptions that are frequently
13 used today, can the patient just take those e-prescriptions
14 and bring them to another pharmacy?

15 A No, when an e-prescription comes into the pharmacy, it
16 is legally our prescription. If somehow we can't fill the
17 prescription, we have to call the doctor and we have to
18 cancel it out of our software system and the doctor would
19 have to e-prescribe it to a different pharmacy.

20 THE COURT: Mr. Fogel, what is an e-prescription?

21 THE WITNESS: E-prescription is an electronic
22 prescription. New York State passed a law, it's part of the
23 ISoP law, there is going to be no more paper prescriptions in
24 New York State as of March 26, 2016. That was originally
25 supposed to go into effect March 26, 2015, but it was

1 extended because physicians, their EHR systems, electronic
2 health record and electronic medical record systems were not
3 ready, so the governor extended it. So an e-prescription is
4 a electronic prescription. You do not have to go to a doctor
5 any more with a handwritten prescription -- I mean, to the
6 pharmacy any more with a handwritten prescription.
7 Everything will be electronic, it's from computer to
8 computer. Or it can be from your smartphone to the computer.
9 There is recall kinds of regulations around it.

10 THE COURT: Thank you.

11 Q So patients would have to actually go back to their
12 doctor, see their doctor again and get a new prescription
13 because they can't use Linden Care for that e-prescription?

14 A Yes. The doctor would have to e-prescribe a new
15 prescription.

16 Q Are you familiar with the company Horizon Drugs?

17 A Yes.

18 Q Does Horizon Drugs own any part of Linden Care?

19 A No.

20 Q And are there other manufacturers besides Horizon that
21 Linden Care does business with?

22 A Yes.

23 Q Is it your expectation that Linden Care can continue to
24 reach into its own pockets to provide emergency bridge
25 refills for the patients that have been impacted by this

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1 sudden termination?

2 A I don't know how much longer we can go. I'm not on the
3 financial side of the equation, but as we're sitting here
4 today, I can tell you we're probably doing the same thing
5 today because today is Friday and patients are running out of
6 their medication over the weekend. I don't think we can go
7 much longer.

8 Q And Linden Care as a pharmacy and you as a pharmacist,
9 are you aware that you have an option to seek peer review
10 appeal and hearing of the termination?

11 A Yes, I am.

12 Q And is that something you've requested, correct?

13 A Yes, obviously.

14 Q And would you be prepared to go to a hearing?

15 A Without a doubt.

16 MS. CLARK: That's all I have, Your Honor.

17 THE COURT: Thank you, Ms. Clark. Ms. Hellman,
18 cross-examination?

19 MS. HELLMAN: Mr. Smith.

20 *CROSS-EXAMINATION BY MR. SMITH:*

21 Q Good morning, Mr. Fogel.

22 A Good morning.

23 Q I'd like to start, if we could, with where you ended.
24 You were talking about some concerns about locating
25 alternative pharmacies for some of the Express Scripts

1 members served by Linden Care. Are you aware that Express
2 Scripts has reached out to Linden Care on several occasions
3 to try to get Linden Care's cooperation in identifying who
4 those members are and to the extent there are members that
5 have difficulty assisting and locating alternative
6 pharmacies?

7 A Not to my knowledge, no.

8 Q So that has not been provided to you?

9 A No, not to me.

10 Q Okay. Would it surprise you to learn that Express
11 Scripts has actually written several letters to that effect?

12 A Yes.

13 MR. SMITH: Your Honor, if I could approach the
14 witness?

15 THE COURT: Sure.

16 Q Mr. Fogel, I'm handing you what has been marked as a
17 document filed in this case, document 33. This is a
18 declaration of Ms. Hellman. If you could, please, I would
19 like you to turn to the page at the top that says 33-1.

20 A Okay.

21 Q Do you see that, sir?

22 A Yes.

23 Q It's a letter dated November 13 of 2015?

24 A No, I don't see that. I see 11/17/15.

25 Q It's the document 33-1. The date is directly below the

1 address line, sir.

2 A I don't see it.

3 Q Do you see where it says, Sarah Hellman, partner, 190
4 Carondelet Plaza in the center of the document?

5 THE COURT: Mr. Smith, let me just interrupt. The
6 Court has these letters and this witness has said he is not
7 familiar with this.

8 MR. SMITH: That's fine.

9 A I don't see it.

10 MR. SMITH: I agree, it's in the record that we
11 made this outreach, and the witness has said he did not --
12 was not aware of that.

13 Q Mr. Fogel, you also mentioned harm that you thought
14 would come to Linden Care as a result of this termination,
15 correct?

16 A I'm sorry, say that again.

17 Q Harm that you believe will come to Linden Care as a
18 result of the termination of the contract with Express
19 Scripts, correct?

20 A Correct.

21 Q And I think in your papers you said that Express Scripts
22 is approximately 20 percent of Linden Care's business, is
23 that accurate?

24 A I don't know what's accurate.

25 MS. CLARK: Objection, Your Honor. Counsel says in

1 the papers. Is he talking about an affidavit of this witness
2 or a different witness?

3 MR. SMITH: No, I'm talking about your complaint.

4 MS. CLARK: This is the pharmacist.

5 Q Sir, your complaint represented that Express Scripts is
6 approximately 20 percent of Linden Care's business. Would
7 you dispute that?

8 A I don't know the exact number. I'm a pharmacist. I
9 thought it was 25 percent.

10 Q So when you say you believed that Express Scripts'
11 termination will impact Linden Care, you have no basis for
12 any specific financial impact with Linden Care?

13 A I'm not in finance.

14 Q I just want to make sure. Whether you are or not
15 testifying to that. Sir, you also stated that Linden Care is
16 a specialty pharmacy, and I think you said that repeatedly in
17 your direct, correct?

18 A Yes.

19 Q Is that a significant part of Linden Care's operations?

20 A Yes.

21 Q It's part of your core business?

22 A Correct.

23 Q Are you familiar, sir, with the provider certification
24 that Linden Care submitted to Express Scripts as part of its
25 contracting?

1 A No.

2 Q It's not something that you reviewed?

3 A No.

4 Q But you believe Linden Care would represent at all times
5 that it was a specialty pharmacy if, in fact, it is a
6 specialty pharmacy?

7 A Yes, I would imagine.

8 Q And it would be inaccurate and a misrepresentation to
9 say that Linden Care was not?

10 A Correct.

11 Q

12 MR. SMITH: Your Honor, I have no further questions
13 for this witness.

14 THE COURT: Thank you, Mr. Smith. Any redirect?

15 REDIRECT EXAMINATION BY MS. CLARK:

16 Q Mr. Fogel, in connection with the information, the
17 information flow back and forth with Express Scripts as the
18 pharmacy benefit manager, would Express Scripts have in its
19 own system the names of the patients?

20 A Yes. Every prescription that we fill is adjudicated,
21 it's an electronics submission.

22 Q And the Express Scripts database would also show who's
23 running out, correct?

24 A Yes. We fill prescriptions on the thirty day supply.

25 Q And that would be in their system, correct?

1 A Of course.

2 Q So they would have everything they needed to do a
3 reach-out to patients that were at risk of running out of
4 their drugs in the interim here between the termination last
5 Tuesday and today, right?

6 A Yes. Every patient is on a different cycle so they
7 would run out, every day it's a new patient.

8 Q To your knowledge has Express Scripts done anything to
9 reach out to the prescribers or the patients that you've been
10 in contact with?

11 A Not to my knowledge.

12 MS. CLARK: Thank you.

13 MR. SMITH: If I could just briefly a few
14 questions.

15 THE COURT: Yes.

16 *RECROSS-EXAMINATION BY MR. SMITH:*

17 Q I just want to clarify a couple points you made. You
18 said in Express Scripts systems, Express Scripts would have
19 the information it needed to identify members who had been
20 unable to locate an alternate pharmacy, is that your
21 testimony, sir?

22 A My testimony is they have all the information to track
23 patients' history of prescription fills.

24 Q So Express Scripts has claims data on patients?

25 A They have all the claims data.

1 Q But that claims data, sir, it would not identify to
2 Express Scripts if an anonymous member or a member, I guess,
3 come to Linden Care and had told Linden Care that they were
4 having difficulty locating an alternative pharmacy, would it,
5 sir?

6 A Are you talking about a new patient?

7 Q I'm talking about if a patient came to Linden Care and
8 said I'm having trouble locating an alternative pharmacy for
9 this particular drug, isn't it correct, sir, that Express
10 Scripts would not have that information in its claims data?

11 A I'm not sure I understand what you're saying.

12 Q You stated that patients came to Linden Care and said
13 they were having difficulty locating an alternate pharmacy,
14 correct?

15 A Okay.

16 Q I'm trying to understand from the questions Ms. Clark
17 asked you, I thought you were saying that Express Scripts had
18 information to identify those patients in its system. And I
19 want to clarify with you, sir, that you agree the information
20 Express Scripts would have would be on historical claims
21 information. Express Scripts systems would not identify if a
22 member came to Linden Care and told Linden Care that it was
23 having, he or she was having difficulty locating an
24 alternative pharmacy, correct, sir?

25 A That's correct.

1 Q That information would be solely in Linden Care's
2 possession, correct?

3 A I believe it's in Express Scripts' also, in their
4 database.

5 Q Sir, I want to make sure I understand.

6 THE COURT: Mr. Smith, could you ask one question
7 just so the record is clear?

8 MR. SMITH: Sure.

9 Q I want to make sure I understand. If a patient came to
10 Linden Care and said they did not have -- they were having
11 trouble locating an alternate pharmacy, that information
12 would not be in Express Scripts' systems, correct?

13 A If a patient came in to my pharmacy and they wanted an
14 alternate pharmacy, Express Scripts would have that
15 information in their database or records.

16 Q Let me make sure I understand. Your testimony is if a
17 patient told Linden Care that, for example, they couldn't get
18 their prescription at the Village Pharmacy, your testimony is
19 that that would be reflected in Express Scripts' claims data?
20 Is that what you're saying, sir?

21 A No, I'm not understanding. I don't understand what
22 you're asking.

23 Q I'm not trying to confuse you, I'm really not.

24 A I'm sorry.

25 Q I'm trying to understand how and if it's your testimony

1 that you believe there is something in Express Scripts'
2 claims data that would indicate, from Linden Care, a
3 communication from Linden Care to Express Scripts, for
4 example, that would indicate that member A came into Linden
5 Care, told Linden Care they were trying to locate an
6 alternative pharmacy and couldn't find one, there is no
7 element like that in the claims data, sir, is there?

8 A No.

9 Q So Express Scripts would not have in its systems
10 information on a member if the member came to Linden Care and
11 said they were trying to locate an alternate pharmacy,
12 couldn't locate an alternate pharmacy, that information would
13 not be in Express Scripts' systems, correct?

14 A No.

15 Q Thank you, sir.

16 A Now I understand.

17 MR. SMITH: No further questions.

18 MS. CLARK: Nothing more, Your Honor.

19 THE COURT: Mr. Fogel, you are excused. Thank you.
20 Ms. Clark, call your next witness.

21 MS. CLARK: I'm going to yield to my colleague,
22 Mr. Cost.

23 MR. COST: The plaintiff calls Dr. Alex Weingarten.

24 THE CLERK: State and spell your name for the
25 record.

1 THE WITNESS: Alexander Eugene Weingarten,
2 W-E-I-N-G-A-R-T-E-N.

3 **ALEXANDER WEINGARTEN**, called as a witness and
4 being duly sworn, testifies as follows:

5 *DIRECT EXAMINATION BY MR. COST:*

6 Q Could you state your name again for the record?

7 A Alexander Eugene Weingarten, MD.

8 Q Dr. Weingarten, where are you based out of?

9 A I have two offices; one in New Hyde Park and one in
10 Syosset, Long Island.

11 Q And do you have any specialty as a medical doctor?

12 A Yes. I'm a board certified anesthesiologist with a
13 subspecialty certification in pain medicine.

14 Q Could you just give the Court and again very general
15 list of your credentials?

16 A Yes. I went to the City University of New York, Queens
17 College, graduated in 1976. That was followed by four years
18 of medical school right here in Syracuse actually at the
19 Upstate Medical Center, now known as Upstate Medical
20 University. That was from 1976 to 1980. I then did an
21 internship in internal medicine at Long Island Jewish Medical
22 Center, now known as North Shore Long Island Jewish Medical
23 Systems. That was from '80 to '81. '81 to '83 I did an
24 anesthesia residency at the same hospital. '83 to '84 I did
25 a fellowship in pediatric anesthesia at the Children's

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1 Hospital National Medical Center in Washington, DC. '84 I
2 came back to Long Island Jewish to work as an
3 anesthesiologist from '84 to '91.

4 I then opened my pain management practice in 1991 before
5 the specialty of pain management became recognized by the
6 American Medical Association, so we were one of the first
7 medical practices in Long Island to practice pain management
8 outside the hospital system. So we began that in '91. I
9 became board certified in pain management in and around 1995
10 through the American Academy of Pain Medicine. And
11 subsequently in 1996 I became board certified through the
12 American Board of Anesthesiology. So I have a subspecialty
13 board in pain medicine and I also became board certified in
14 anesthesiologist in 1994, I forgot I mentioned that.

15 Since '91 I've operated my pain management practice. I
16 still continue to do some anesthesia but most of my focus
17 these days is pain management. And we eventually opened a
18 second office in Syosset around 2007, 2008, which we continue
19 to operate today.

20 I also do consulting work, besides clinical medicine, I
21 do consulting work for the Drug Enforcement Administration.
22 And I am past president of the New York State Pain Society,
23 which we incorporated I believe around 2011, and we have an
24 annual meeting every year that attracts about 350 doctors.
25 And my focus at these meetings is safety in opioid

1 prescribing. So that's the section that I generally organize
2 a panel for. We do a lot of topics at the meeting, it's a
3 weekend meeting. But my focus is safety in opioid
4 prescribing. Again, I continued with CMEs, educational,
5 meeting, I give lectures, I teach medical students and some
6 residents, so I continue to engage in academics along with
7 clinical medicine.

8 Q Have you ever been qualified as an expert in New York
9 State courts?

10 A Yes, many times.

11 Q About how many times?

12 A Well, New York State I can't tell you but probably
13 across the country I've testified between 250 and 300 times,
14 and I've also testified in federal court both on Long Island
15 and also in Florida, and I've been qualified.

16 Q What kind of patients in your pain management practice
17 are you normally servicing or treating?

18 A I generally treat patients with chronic pain. That's
19 the definition being pain that's been present for more than
20 two to three months. We do see some acute pain but the
21 majority of our practice is chronic pain, pain that's not
22 going to go away unless some intervention, be it an
23 injection, be it medication, is given to the patient.

24 Q And you mentioned medication. I take it then you're
25 familiar with what kind of medications are effective and what

1 medication is not effective?

2 A Yes. Depending upon the patient, you know, I'll do a
3 history to determine what the patient has tried in the past,
4 what has helped, what has not helped, what medications have
5 given the patient side effects. So generally, I'll either
6 continue another doctor's medication, assuming the patient
7 has transferred their care to my office, assuming those
8 medications have been successful in helping the patient have
9 a tolerable level of pain, and we have different ways of
10 measuring that, with the minimum amount of side effect. So
11 every patient is different.

12 We tailor -- or, I tailor my treatment to whatever the
13 patient's disease process is. And again, different disease
14 processes will signal the need for different types of
15 medications based on, you know, where the either spinal
16 pathology, where the nerve damage is located and what type of
17 nerve damage one is talking about.

18 Q And in that course, essentially you're saying that you
19 eventually find what kind of pain medication works and what
20 doesn't?

21 A Yes.

22 Q And you prescribe your patients the pain medication that
23 works, because that's the primary goal is to eliminate the
24 pain, is that right?

25 A Right. The primary goal, and again this dates back to

1 1999 or so when the World Health Organization came out with
2 an edict that we have the technology now such that no patient
3 should suffer with intolerable pain. There is technology
4 available for every disease process or almost every disease
5 process and it's a basic human right that every patient has
6 the right for pain relief.

7 Q As part of that are there certain pain medications which
8 are known as specialty drugs?

9 A Yes.

10 Q Can you just give a brief definition of a specialty
11 drug.

12 A Specialty drugs are drugs that are tailored to one
13 disease, one area of disease. In my case it's pain
14 management. And these are drugs that are not going to be
15 found easily at your chain pharmacies, at your Walgreens,
16 your CVSs, these pharmacies are not going to stock these
17 drugs on a regular basis because of the fear of diversion of
18 the drugs in a large building with a lot of employees that
19 may not be the most trustworthy of people, and for cost
20 reasons.

21 So specialty drugs are drugs that are generally branded,
22 generally they're relatively expensive, but they come with
23 technologies that almost guarantee that assuming the
24 appropriate patient is given these drugs, that they will work
25 a lot better than previous treatments that the patient has

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1 tried in terms of medications and they're reliable to help
2 the patient on almost every single dose that they take.

3 Q So it's fair to say that it takes a special kind of
4 pharmacy to have specialty drugs, is that right?

5 A Yes. It requires a lot of capital. It requires a lot
6 of inventory. But again, and it requires a lot of monitoring
7 as we heard earlier. But specialty pharmacies know how to,
8 you know, advise the patient about the drugs, monitor the
9 patients for abuse and diversion, just like we as physicians
10 try to monitor the patient, but they're a second line in
11 defense to make sure that, A, the right patient is getting
12 the medicine; B, the side effect profile is such like many
13 times I'll get calls from pharmacies like Linden Care, well,
14 did you know the patient is on drug X, which maybe the
15 patient didn't tell me about and then maybe some adverse
16 interaction with what you want to prescribe, do you think we
17 should maybe choose a different medication. So I've had that
18 situation, you know, multiple times over the years because
19 pharmacies, specialty pharmacies take certainly a much more
20 active interest in the patient's well being than you would
21 ever see at a chain pharmacy where you never, you hardly ever
22 get a call from a pharmacist and they will not usually stock
23 those drugs.

24 Q And you mentioned Linden Care. Do you have patients
25 that go to Linden Care?

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1 A I have a lot of patients that go to Linden Care.

2 Q And everything you just said what it takes to be a
3 specialty pharmacy, does Linden Care do all those activities?

4 A Yes. It's not unusual for me to get phone calls from a
5 pharmacist like Jordan. He usually calls me the most, and I
6 know him a long time. But again, there is a unique concern
7 I'll help him with the prior authorizations, when those forms
8 are sent to me we'll -- you know, we'll try -- they'll
9 process it and they'll stay to all hours of the night on some
10 of these. Some of the pharmaceutical managers have up until
11 midnight 800 numbers that we can call and we sometimes stay
12 10, 11 clock at night on the phone for a patient that needs
13 an emergency supply because they either changed their
14 insurance or all of a sudden their insurance carrier decided
15 not to cover a medication that they've been getting for the
16 last two years, but because it's a new year for the patient,
17 all of a sudden they send the patient a letter, well, we will
18 no longer cover this drug and they leave the patient, you
19 know, high and dry without any medications. And it's again
20 not unusual for Linden Care to bridge the gap on these
21 patients until that paperwork is completed and until the
22 authorization is received.

23 Q Is that level of service important to you as a
24 physician?

25 A Yes.

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1 Q And why is that?

2 A Well, because, again, we have a common goal, we want to
3 help the patient, because the patient is the one that's
4 suffering. And many times it's not the patient's fault that
5 they get involved with paperwork that either denies them the
6 proper medicine or cuts them off abruptly because the
7 pharmacy, the health care providers, it doesn't seem to
8 bother them that if a patient has been on a heavy dose of
9 opioid for many months and years that they're going to go
10 into withdrawal. The carriers never care about those things.

11 But it's the people like Linden Care and myself that
12 hear the cries of the patient, what am I going to do if I
13 can't get this medicine, I'm going to wind up in the
14 emergency room. That's the common fear that most patients on
15 long term controlled substances have, and we have to deal
16 with this at midnight, at whatever time of day it is well
17 after the health care providers' offices for customer service
18 are closed. And if it wouldn't be for, you know, pharmacies
19 like Linden Care, these patients would be in dire straits
20 because, again, there are very few choices that they have in
21 order to be able to get these drugs. And the cost of many
22 them of prohibitive for most people on fixed incomes.

23 Q And you mentioned carriers. Also in your years of
24 practice known as PBMs?

25 A Yes.

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1 Q And you dealt with Express Scripts?

2 A Yes.

3 Q And do you find Express Scripts, again given the
4 recitation about carriers not caring about the withdrawal
5 symptoms, do you find that to be true about PBMs?

6 A PBMs will never worry about whether the patient is going
7 into withdrawal. With them it's just business, okay. The
8 drug, the pharmacy, dispensing is a business and they have --
9 they decide whether they're going to pay for it, whether
10 they're not going to pay for it with total disregard for the
11 patient.

12 And again it's a neat world out there but they control
13 what I do. You know, if I want the patient to have, let's
14 say, a medicine like Duexis, which I think is part of our
15 discussion today, they'll decide whether the patient gets it,
16 even though I can prove that the samples that the patient
17 used did a great job in helping their pain. They don't care
18 about things like that.

19 Although I will indicate on some of their questionnaires
20 that the patient had a good result, we gave them a few days
21 supply of samples, they did fine, whereas the other
22 alternatives didn't work. But again, as far as abrupt
23 discontinuation of medicines, I have never seen anybody ever
24 help me with a patient that wasn't approved for a drug from
25 Express Scripts or any other PBM get an emergency supply of

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1 medicine on their account. Okay. Linden Care goes out on a
2 limb to help those patients, but Express Scripts has never
3 allowed me to give a patient an emergency amount until the
4 dispute is resolved or whatever the problem is is resolved.
5 They have never come to the patient's aid. And it's not just
6 Express Scripts, it's any PBM.

7 Q And that would be included in this situation, is that
8 right?

9 A Yes.

10 Q Now, you also mentioned -- first, have you been in
11 Linden Care's physical location?

12 A I'm sorry?

13 Q Linden Care is a retail pharmacy, right?

14 A Yes.

15 Q It's got a store front?

16 A It has a store front. It has a parking lot. Patients
17 go there from my office. I'm in Syosset, they're close by in
18 Woodbury. I know their hours so I know which patients have
19 to come in early in order for them to get to Linden Care
20 before they close at 7:00 at night.

21 Q Are there any other specialty pharmacies in your area
22 that are like Linden Care?

23 A There are none.

24 Q You also mentioned -- are you also familiar with mail
25 order pharmacies?

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1 A Yes.

2 Q Is that in your mind different than what Linden Care is?

3 A Yes.

4 Q And why is that?

5 A Well, again, even for myself I get letters from Oxford
6 or you United Health Care, you can save on your copay if your
7 doctor sends away to a certain 800 number or fax number and
8 you'll get a three month supply of your medicine for a lower
9 copay. When I get that medicine in the mail, although I
10 hardly ever subscribe to that service, I would rather just
11 walk into a pharmacy because then you're dealing with the
12 mail and there is always delays in that end, but assuming
13 that you go through those type of pharmacies, again you never
14 see a pharmacist, it's just it comes in the mail and you get
15 your three months supply. And again it could even come in
16 two days, six days. I have patients that use mail order and
17 they've stopped using it because the mail is so unreliable
18 that if you're dealing with anything more than simple
19 medicines, you know, they cry to the carrier, well, I haven't
20 received the drug. I'm sorry, it was sent out, we can't help
21 you. And they can take days on end to get it. So many
22 patients stopped using mail order pharmacies just because of
23 the fact that the mail is unreliable.

24 Q Are you familiar with the pharmacy named Accredo?

25 A I have heard of it.

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1 Q Is that in your mind a mail order pharmacy?

2 A Yes.

3 Q And that would be different than what Linden Care is?

4 A Right. Linden Care is a full service retail. And you
5 know, again, for patients that live a distance, a mail order
6 pharmacy.

7 Q When you say mail order, you have patients who are in
8 pain that physically can't get out of bed?

9 A Correct.

10 Q Therefore, they can't go to a retail pharmacy to pick up
11 their medications, right?

12 A Correct.

13 Q So Linden Care delivering medications is an important
14 part of your pain management process that does not
15 necessarily fall under mail order?

16 A Correct. And Linden Care actually I think was one of
17 the first pharmacies to ever have this I call it a concierge
18 service which saves the patient the trouble of getting to
19 Linden Care, especially people that don't drive or are using
20 public transportation to my office, it's a good thing that
21 Linden Care exists because, A, they have drugs that nobody
22 else has; and, B, the patient doesn't have to take
23 transportation just to go pick up a medication but instead
24 they'll have the luxury of arranging a time and place with
25 Linden Care to have it delivered.

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1 Q You never had any complaints about Linden Care?

2 A I don't think any patient has ever complained. They've
3 only thanked me for referring them to Linden Care.

4 Q And obviously given your long and distinguished career,
5 you have a lot of contacts in the medical community, is that
6 right?

7 A Yes.

8 Q And can you -- what's Linden Care's reputation in the
9 medical community?

10 A Well, Linden Care is well liked by all my colleagues.
11 We had our meeting, you know, Linden Care's name always comes
12 up when it comes to certain medications that some of the
13 Pharma people talk about at their booths, because, again,
14 there aren't too many pharmacies in New York or especially
15 the New York metropolitan area that will constantly have a
16 supply of multiple different specialty type drugs as Linden
17 Care has. So again, generally in the medical community their
18 rating is pretty high.

19 Q You discussed today that Linden Care is part of the
20 actual treatment process to help these patients. Do you have
21 an opinion as to using a specialty pharmacy like Linden Care
22 rather than a PBM pharmacy as far as patient outcome is
23 concerned?

24 A Again, over the years when you take care of patients
25 with many different types of chronic devastating disease

1 processes causing severe and devastating pain, you get to
2 know which medicines are going to help them and which
3 medicines not to waste your time on. And generally the
4 medicines that will help them are the medicines generally
5 carried in the good specialty pharmacy. If I rely on Express
6 Scripts directly, it's going to be very hard for them to get
7 those specialty drugs and it's going to be a lot of paperwork
8 for me, which I don't have the time to do. And that's
9 another benefit for Linden Care, they have designated people
10 that work throughout the day and night getting authorizations
11 for the doctors. They ask us a few questions, we answer the
12 questions to give a little clinical background on the patient
13 and they take it from there.

14 Express Scripts is not going to help me with that
15 paperwork and it's going to be left to me and my staff who
16 are already overwhelmed just in terms of getting
17 authorizations for other things like MRIs, EMGs and things
18 that we have to do in our practice to, you know, to figure
19 out why patients are having the pain that they're having.

20 Q If Linden Care can't be part of ESI's network and your
21 patients who are in that network, can you still refer them to
22 Linden Care?

23 A Well, obviously, if they're not going to be able to use
24 their Express Scripts, you know, provider benefits on a long
25 term basis, Linden Care is not going to be able to help them.

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1 And again, there aren't, as we heard earlier, too many
2 alternatives in the area of pharmacists that are willing to
3 pick up those patients because there will be a huge volume of
4 them, especially from my practice, and these patients are
5 going to have, it will wind up that they'll have to drive,
6 you know, probably many miles to find other pharmacies that
7 may or may not help them.

8 Q And some can't drive, right?

9 A And some can't drive.

10 Q What about again the argument we hear that, oh, you can
11 always go out of network, is this true for a specialty drug?

12 A It's really not true for a specialty drug, because
13 unless you're a person of extremely well means, some of these
14 medications can cost between 10 and \$20,000 a month, you
15 know, for refills. So going out of network means that the
16 patient is going to have to pay cash for their medications or
17 some other form of payment, so I don't see that as
18 economically feasible for most of the patients that are seen
19 in practices like myself.

20 Q Could you give us a specific example of a drug that
21 would be cost prohibitive out of network?

22 A Yes. There is -- we talked about the TIRF REMS
23 medications, so just picking one of them, there is a medicine
24 called Subsys. It's a spray fentanyl medication. It goes
25 under the tongue. Fentanyl, as Mr. Fogel mentioned, is 100

1 times more potent than morphine, so the average person
2 usually needs about four of those sprays a day, which would
3 be about four -- so the packaging comes, they come thirty in
4 a box. So four sprays a day would be 120 sprays, because
5 each package is one dose. So you would need thirty in a box,
6 four boxes, 120 sprays for the month. Each box runs about
7 \$2,500 or more, so you would be talking \$10,000 a month for
8 one particular drug. And that's just a breakthrough cancer
9 pain medicine, that's not inclusive of the long acting opioid
10 that by law they have to be on in order to be eligible for
11 the REMS medication.

12 So just \$10,000 a month for the breakthrough medicine,
13 and that's not including all the other medicines, the
14 anti-inflammatories, the long acting narcotics, probably some
15 neurological medicines like Lyrica, Neurontin or whatever.
16 So again, you would be talking ten plus thousand a month just
17 for a month's supply of medication.

18 Q And if you can no longer refer your patients to Linden
19 Care, obviously, then simple economics, Linden Care doesn't
20 get paid for the prescriptions, right?

21 A Right. Well, if you can't refer them to Linden Care,
22 they're not going to have another alternative in an easy way
23 to find because, again, they're certainly not going to get
24 help from their pharmacy manager because I don't think it's
25 in their best interest to try to steer patients to high cost

1 medications.

2 Q And again, would other doctors that you know of who
3 refer patients to Linden Care be in the same position as you?

4 A Yes.

5 Q Let's talk, you mentioned authorizations being burdens.
6 What other kinds of administrative burdens would this cause
7 on you if Linden Care's removed from the network?

8 A Well, the reason why the specialty pharmacy and their
9 medications work is because it would take a lot more less
10 potent medications to accomplish the same purpose; namely,
11 bringing pain down to a tolerable level. So if you take a
12 drug like Subsys, which is 100 times more potent than
13 morphine, and the patient can't get that because of poor
14 access to a specialty pharmacy, so then we have to use
15 whatever is available locally from small pharmacies and
16 possibly even the chains, and that will generally be the
17 generic opioids such as oxycodone, hydrocodone, morphine
18 based medicines. And generally to make up the difference, if
19 you want to use that word, these patients can be on fifteen
20 to twenty pills a day when they would have been on four to
21 five pills a day because of the lower potency of those
22 alternatives.

23 And then the doctor runs into the problem, all of a
24 sudden, you know, he is giving out big numbers of medicines,
25 twenty pills a day of opioid, times thirty, that's 600 pills

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1 a month, and that's being recorded at the state level in
2 Albany. So now Dr. X with no bad intentions is having to
3 give out twenty pills a month at 600 pills a month -- some
4 twenty pills a day, 600 pills a month, when he was giving out
5 maybe four to six pills a day of opioid between the short and
6 long acting, at 180 pills a month. All of a sudden it would
7 not surprise me if a DEA agent knocks on your door, why all
8 of a sudden are our numbers showing that you're dispensing so
9 much medication. So the doctor has exposure, again nothing
10 of his fault, because of the fact that he can't get ahold of
11 those better medicines that would, A, do better for the
12 patient, and, B, not imply that he is a candy store for
13 opioids.

14 And for the patient many of these medications are
15 Tylenol based, so you give patients fifteen to twenty pills a
16 day, some of which had a lot of Tylenol in it, they're going
17 to run the risk of toxicity to the kidneys and liver, and you
18 don't want that to happen. So there is restrictions based on
19 the Tylenol content on some of these medicines so that keeps
20 the patient from getting what's going to be needed for his or
21 her pain. There is restrictions on the doctor's level
22 because of the numbers that it's now going to entail that
23 make up the difference now that we're not using specialty
24 drugs. So nobody wins from this. Everybody loses.

25 But more importantly, with all that, the patient still

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1 doesn't get good pain relief because these medications over
2 time have been proven to be not as good, they're old
3 fashioned drugs that have been around twenty, thirty years.
4 And just like new cars, the newer drugs are a lot safer when
5 used properly than the older drugs which patients tend to
6 take too much of.

7 Q Doctor, are you concerned about your patients' health
8 given this situation?

9 A I'm always concerned about my patient's health.

10 Q And particularly in this situation if they can't use
11 Linden Care?

12 A Very much so, yes.

13 Q Have patients come to you saying that their
14 prescriptions have run out?

15 A I've gotten phone calls already from the fact that they
16 were worried about what they read in the newspaper. But
17 knowing from when I had spoken to the people at Linden Care,
18 I told them just keep going there, they're going to continue
19 getting you your medicine, don't worry about Express Scripts
20 right now, it's more important that you don't run out of your
21 medicine and run the risk of going into withdrawal.

22 Q And you know it has to end at some point?

23 A What's that?

24 Q Linden Care, they can't keep just filling scripts?

25 A That's correct.

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1 Q What are the potential consequences to your patients if
2 they can't get their medications?

3 A Well, many of them will certainly run a high risk of
4 going into withdrawal just because they're physically
5 dependent on these opioids based on long term use. Again,
6 they're not addicts. Addiction is defined as the improper
7 use of controlled substances for no medical purpose, that's
8 the definition of addiction. They have a medical purpose,
9 they need the medicine. So by nature they will be physically
10 dependent, but that's a natural process of being on opioids
11 for a long time.

12 So they are physically dependent. As a result they
13 will, many of them will go into withdrawal. And eventually
14 obviously the withdrawals will be treated in a hospital, but
15 eventually they'll be switched to alternative medicines that
16 will not be as good and their level of pain on a daily basis
17 has to rise because it's not being adequately treated with
18 the good medicines that we were giving before which they used
19 to receive at Linden Care.

20 Q And is that a remote possibility or something that in
21 your experience is fairly certain going to happen?

22 A This is a very, very realistic possibility based on what
23 happens when you switch from more potent opioids to less
24 potent opioids.

25 MR. COST: No further questions at this time.

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1 Thank you.

2 THE COURT: Thank you, Mr. Cost.

3 Cross-examination.

4 *CROSS-EXAMINATION BY MS. HELLMAN:*

5 Q Good morning, Doctor.

6 A Good morning.

7 Q You've testified here for a while, and clearly I think
8 you have a high opinion of Linden Care, correct?

9 A Yes.

10 Q Your office, are you guys office right next door to each
11 other?

12 A They used to be our tenant several years ago but they
13 needed to expand to a bigger space so they're now in
14 Woodbury.

15 Q Linden Care is growing a lot so they have a much bigger
16 space, right?

17 A Yes.

18 Q As a physician who obviously has a high regard of Linden
19 Care, would it concern you if Linden Care was shipping
20 prescriptions into a state that it wasn't licensed in?

21 A Again, it would concern me, but again, I would also want
22 to know all the facts and see if there were any technical
23 reasons from their point to dispute that.

24 Q If Linden Care -- well, strike that.

25 If Linden Care was shipping prescriptions, let's say,

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1 into the State of California where a license is required to a
2 person that resided in California multiple times, would that
3 concern you?

4 A Again, from a medical basis if the patient needed the
5 medicine, I'm not sure if it would concern me. Because again
6 from a legal basis again that may be of concern, but if there
7 was a medical reason for that patient to get the medicine,
8 I'd probably be less concerned about it.

9 Q Do you practice in the states that you're not licensed?

10 A No.

11 Q Now, conversely, the opinion that you hold of Linden
12 Care, you clearly have some opinions about insurers and PBMs
13 and you shared those general opinions today. But I want to
14 drill down a little bit and make sure I understand exactly
15 what you're saying and what you're telling this Court. Is it
16 your testimony -- back up a minute. The prescriptions that
17 you write, those are for New York residents, correct?

18 A Yes.

19 Q And we know that Linden Care does in excess of
20 70 percent out of state business, you're aware of that,
21 correct?

22 A Yes.

23 MR. COST: Objection, Your Honor. Foundation.

24 MS. HELLMAN: I believe he testified in answer to
25 the question that he understood that.

1 THE COURT: Do you know that?

2 A I don't know if it's 70 percent. I know they do
3 business in multiple states. I will correct my answer by
4 saying I'm not sure if it's 70 percent or what percent it
5 actually is, but I know they are licensed in, you know, many
6 states other than New York.

7 Q Thank you. So let's talk about the patients that you're
8 writing prescriptions for to be filled at Linden Care. Is it
9 your testimony, are you telling this Court that there is not
10 another New York pharmacy that they can get these
11 prescriptions filled at? Is that your testimony?

12 A No.

13 Q You would agree that there are several, numerous other
14 New York pharmacies that your patients can get their
15 prescriptions filled at, correct?

16 A I don't think it's numerous but certainly several, yes.

17 Q Have you called any of those pharmacies?

18 A Yes. I use them on occasion, yes.

19 Q And since last Tuesday or whenever you were notified
20 that Linden Care was terminated from the Express Scripts
21 network, have you worked with any of those pharmacies to
22 transition your patients?

23 A There hasn't been a reason to because they're still
24 getting their medicine at Linden Care.

25 Q And you mentioned a lot about PBMs and what they do and

1 what they don't do. If Express Scripts had offered to assist
2 in finding an alternative location for members that could not
3 find one, would you want to know that for your patients?

4 A Again, assuming that Linden Care could no longer take
5 care of them, the answer is yes.

6 Q But as of today Linden Care can still take care of them,
7 is that right?

8 A Well, they're taking care of them by virtue of their
9 moral obligation, but theoretically they don't have to take
10 care of them.

11 Q And are you considering now trying to find an
12 alternative pharmacy that can take care of your patients?

13 A I'm hoping that's not going to have to be an issue.

14 Q But you certainly know there is alternative pharmacies
15 in the State of New York?

16 A Yes.

17 Q You mentioned earlier that you were asked a little bit
18 about Accredo. Do you remember that testimony?

19 A Yes.

20 Q And I think you testified that Accredo is different than
21 Linden Care, correct?

22 A I believe so, yes.

23 Q And one of the drugs that you testified to that you
24 prescribed that's filled at Linden Care is fentanyl, correct?

25 A Yes.

1 Q And then you also -- do you also prescribe non-narcotic
2 medications, non-narcotic medications that are filled at
3 Linden Care?

4 A Yes, many.

5 Q I think you mentioned Duexis is one of those, correct?

6 A Yes.

7 Q Rayos is another one?

8 A I'm sorry?

9 Q Rayos, do you know that drug?

10 A I'm not familiar with it.

11 Q What about Vimovo, is that a drug that you prescribe?

12 A Yes.

13 Q That's a drug that's filled at Linden Care?

14 A Yes.

15 Q Those two drugs, Duexis and Vimovo, those aren't
16 narcotic drugs, correct?

17 A Correct. They're anti-inflammatories.

18 Q They can be filled at any number of pharmacies, correct?

19 A Yes. But again, they can be filled at any number of
20 pharmacies but many of the patients will not get the medicine
21 unless it's filled at Linden Care.

22 Q Okay. You can write a prescription for, let's say,
23 Vimovo, correct, for one of your patients, correct?

24 A Correct.

25 Q And I know now normally you send them to Linden Care,

1 correct?

2 A Correct.

3 Q You can send them to another pharmacy in the State of
4 New York to get that prescription filled, can't you?

5 A If it's a specialty pharmacy that deals with those
6 drugs, yes, but certainly the chain pharmacies, most of them
7 will not give the patients those two medications.

8 Q And I understand that. But there are other pharmacies
9 in the State of New York that can fill a prescription for,
10 say, Vimovo, correct?

11 A Sure, yes.

12 Q And the same for the fentanyl, correct?

13 A The fentanyl?

14 Q Yes.

15 A I guess if the patient wants to travel between thirty
16 and fifty miles, I'm sure you'll find a pharmacy willing to
17 do that.

18 Q Do you know if those pharmacies will ship the
19 prescriptions to the patient?

20 A Some of them will.

21 MS. HELLMAN: I have no further questions.

22 THE COURT: Mr. Cost.

23 MR. COST: Briefly, Your Honor.

24 REDIRECT EXAMINATION BY MR. COST:

25 Q Doctor, Ms. Hellman asked if it would concern you if

1 Linden Care shipped into a state such as California where
2 someone resided, right? What if that was a New York resident
3 who just moved to California and their prescription ran out,
4 would that concern you?

5 A It would not concern me, assuming that they were a
6 New York resident who happened to be residing in California.

7 Q What about or if it were another state they were
8 licensed in and recently moved to California, would that
9 situation concern you?

10 A Again, assuming that there is medical indication for the
11 drug, the answer is no.

12 Q What if someone was on vacation and forgot to take their
13 medications with them, would that concern you?

14 A No.

15 Q Are you aware of anything ESI has done to reach out to
16 your patients about this termination?

17 A They haven't notified me at all.

18 Q They haven't notified you at all?

19 A Correct.

20 Q And what about your patients, are you aware anything
21 they've done to notify them?

22 A The only thing that comes close to it is a patient
23 yesterday who I saw, of all days to see a patient
24 coincidentally, who told me that they had gotten and received
25 a sort of strange letter from Express Scripts indicating all

1 the medications that she was on, and they asked her because
2 she is a patient at Linden Care, did Linden Care give you all
3 these medications. And she found it strange because she's
4 been using Express Scripts for a long time, never received
5 the medicine like -- a letter like this. And I found also a
6 little odd. But that's about the closest that I've heard
7 Express Scripts notify any patient about anything via letter
8 concerning Linden Care.

9 Q And that letter, was that letter dated November or
10 October, do you know?

11 A It was a recent letter, yes.

12 Q Do you know whether it was before or after the
13 termination?

14 A It was before.

15 Q Doctor, are you aware that Linden Care itself has
16 reached out to ESI asking them to contact them to discuss
17 patient continuity?

18 A It would not surprise me that that is so, yes.

19 Q And with regard to other pharmacies in the State of New
20 York, New York's not the biggest state but it's a fair amount
21 of miles, correct?

22 A Yes.

23 Q And you told me that there are patients that simply
24 can't drive, right?

25 A Correct.

Alexander Weingarten - Redirect - Mr. Cost

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1 Q So in certain circumstances it may be impossible for
2 certain patients to get to other specialty pharmacies, is
3 that right?

4 A Correct.

5 MR. COST: No further questions.

6 THE COURT: Thank you, Mr. Cost. Ms. Hellman?

7 MS. HELLMAN: I have nothing further.

8 THE COURT: Dr. Weingarten, you may step down.
9 Thank you. Ms. Clark, could you call your next witness?

10 MS. CLARK: Your Honor, would this be an
11 appropriate time for a quick break just to line things up?

12 THE COURT: Well, I'm a little concerned, it looks
13 like the parties have a fair amount on calendar. Could we
14 get started with the witness and take a break at 12:15?

15 MS. CLARK: Yep, that would be fine, Your Honor.
16 Thank you. At this time we're going to call a couple of the
17 patients who are standing by. That's one of the logistical
18 issues we were trying to resolve on a break was who is
19 available so we could get to everybody in a time frame when
20 it was convenient for them, especially nonparties. At this
21 time we're going to call Art Kersey.

22 THE CLERK: State and spell your name for the
23 record.

24 THE WITNESS: Arthur Kersey; A-R-T-H-U-R,
25 K-E-R-S-E-Y.

1
2
3 **ARTHUR KERSEY**, called as a witness and being
4 duly sworn, testifies as follows:

5 *DIRECT EXAMINATION BY MS. CLARK:*

6 Q Good afternoon, Mr. Kersey. Could you state for the
7 record where you currently work?

8 A Yes. I'm currently employed at Linden Care Pharmacy.

9 Q And what is your title?

10 A I am a chief compliance officer.

11 Q And what is your role as chief compliance officer?

12 A As a chief compliance officer I'm charged with several
13 things; vetting physicians, doing research on backgrounds of
14 both physicians and patients through various processes we
15 use, verification of prescribers' ability to prescribe
16 through DEA, state licenses, and also notification of board
17 certifications, et cetera, for some of the prescribers.

18 Q Could you give the Court just a brief description of
19 your background as it relates to compliance?

20 A Yes. I'm a qualified attorney and member of the bar in
21 the State of New York. I was admitted in 1984. I went, then
22 almost immediately went to work for the Drug Enforcement
23 Administration. I spent thirty years with DEA in a variety
24 of assignments, both foreign and domestic, and I retired in
25 March 2014 as the associate special agent in charge for the

1 New York division of DEA, and then went to work at Linden
2 Care.

3 Q How did your role at DEA assist you in your role as
4 chief compliance officer at Linden Care?

5 A Well, through my years of experience in DEA of course
6 I'm familiar with the problem of those medications that are
7 of a concern to both law enforcement, the medical community,
8 their potential to be abused, which would be controlled
9 narcotics. I have some experience in my background doing
10 investigations that would be considered diversion
11 investigations but I was mostly really on enforcement side of
12 the house.

13 Q And can you describe the level of regulation of the
14 medications that Linden Care dispenses?

15 A The narcotic and controlled medications are tightly
16 regulated. We go through audits, both by law enforcement,
17 which would be DEA doing surprise audits, they just show up
18 one day at the pharmacy and they go through all of your
19 records to determine how much you've dispensed versus how
20 much you've ordered. They use their own formulas to
21 determine the ratio that they're looking for and confirm that
22 your dispensing is in line with what you're ordering and what
23 you have on hand.

24 Q Is that level of regulation something that's difficult
25 for local retail community pharmacies to manage?

1 A It is and as a result a vast -- well, not a vast
2 majority, a large percentage of pharmacies simply won't stock
3 some of these medications, especially medications like
4 oxycodone, some of the fentanyl medications.

5 Q And fentanyl medications, are those medications that are
6 subject to the TIRF REMS program?

7 A Right, the medications we're talking about are in the
8 TIRF REMS program.

9 Q As part of your role in compliance, did you also get
10 involved in making sure that Linden Care complies with the
11 aspects of the TIRF REMS program?

12 A Yes. We confirm the patient's enrollment in the TIRF
13 REMS program, the prescribers' enrollment in the TIRF REMS
14 program. I'm on the phone, either myself or Jordan Fogel is
15 on the phone with TIRF REMS almost every day just checking on
16 the status of patients, status of prescribers, and confirming
17 that we have accurate information in order to make sure that
18 we're dispensing properly.

19 Q Will Linden Care dispense medications for just any
20 prescriber?

21 A No. We as a specialty pharmacy we are interested in,
22 you know, taking care of those patients that, as prior
23 witnesses said, they're chronic pain patients. We try to
24 target our prescriber base, the prescribers that we want to
25 have a relationship with and want to work with to

1 anesthesiologists and pain medicine physicians, orthopedic
2 surgeons, physical medicine and rehabilitation. We don't
3 like to deal with or take prescriptions from internal
4 medicine doctors for, as an example, who want to dabble in
5 pain, that's not what we're in the business for.

6 Q What would happen if, for example, my primary care
7 physician prescribed fentanyl for a headache condition or
8 something like that?

9 A A primary care physician is probably not going to be
10 enrolled in TIRF REMS. A primary care physician may not know
11 that, you know, those medications are not -- it's
12 contraindicated for that condition. And these are the type
13 of things, the conversations that especially Mr. Fogel will
14 have with some of these prescribers to let them know, Doctor,
15 you wrote this medication but this is not the proper
16 medication for this patient. There is a lot of back and
17 forth, that type of conversation that goes on.

18 Q And ultimately does Linden Care sometimes reject those
19 prescriptions?

20 A We do.

21 Q And with this web of regulation of pain medicines, are
22 there state laws that apply?

23 A Of course. We're subject to not only DEA regulation,
24 we're subject to the Bureau of Narcotics Enforcement, the New
25 York State Pharmacy Board, they can make unannounced visits

1 at any time, and we also have to go through audits and
2 reviews by the suppliers that we buy from.

3 Q So you're not only audited by the PBMs, you're audited
4 by the suppliers as well?

5 A Exactly.

6 Q What is the relevance of the ISoP program to the way
7 Linden Care does business?

8 A Well, the ISoP program is targeted towards New York.
9 Mr. Fogel has access through I believe it's 43 states in
10 their version of ISoP. They go by different acronyms in
11 different states. But the premise is basically the same,
12 it's a way to monitor what the patient is being prescribed
13 and what medications they're filling at various pharmacies
14 and from various prescribers. We use the New York ISoP
15 program to monitor the New York patients that we serve.

16 Q You heard a lot about the term TIRF REMS program, the
17 ISoP program. How are all those programs relevant to patient
18 safety? What is the risk here?

19 A Well, there are several risks. The big one, of course,
20 is diversion. You can have a new patient show up and you
21 will run the ISoP program, and especially to keep from a
22 physician that we know and dealt with before, it could be a
23 new physician, it's for a narcotic and controlled medication,
24 and we run ISoP and see that this patient filled a similar
25 medication ten days ago from a different prescriber at a

1 different pharmacy. A patient like that we're not going to
2 accept.

3 Q What about the risk to the patients?

4 A There is always the risk of patient overdose, too much
5 medication. The New York State law requires us to make sure
6 that the patients don't have excess medication on hand.

7 Q What part of Linden Care's business helps mitigate that
8 risk?

9 A The fact that we do the ISoP checks, the fact that we
10 have patient/prescriber contracts, an agreement that we would
11 make a patient sign that when they're getting narcotic and
12 controlled medications, they're going to get them through
13 Linden Care or they're going to advise us if an emergent
14 situation came up and they had to go to a different pharmacy
15 for something, they're going to let us know.

16 Q And is accidental overdosing in pain patients a big
17 issue in New York and other states right now?

18 A It is.

19 Q And why is that?

20 A Well, it's not just the patient safety, it's also other
21 family members. You have, you know, countless incidents
22 where an elderly patient is prescribed a narcotic and
23 controlled medication and you come to find out down the road
24 that the medication is being syphoned off by grandchildren,
25 children, other family relations. So that's a safety for the

1 entire community. And that's one of the things that we try
2 to control -- and not control, but assist in the control of
3 by monitoring exactly how much medication the patients are
4 getting.

5 Q And is there a risk of sudden cessation?

6 A Yes, of course. They'll go into withdrawals.

7 Q And last Tuesday did Linden Care receive a termination
8 notice?

9 A Yes, it did.

10 Q And was there any -- was there any communication with
11 Linden Care before that termination notice to put patients on
12 notice that there might be a cessation in their coverage?

13 A Not that I'm aware of.

14 Q Were you involved in the response to that situation that
15 was created?

16 A Yes, I was.

17 Q And why don't you explain to the Court what your
18 involvement was and what the response was from the patients?

19 A Well, for the walk-in patients it was more a case of
20 them coming into the pharmacy to fill their medication and
21 having to be informed by members of our staff that we had
22 been summarily cut out of their, the Express Scripts system,
23 which meant that we could no longer take their insurance.
24 The patients were frantic. We explained to them that they
25 had the choice to go to another pharmacy if they wanted to

1 use their insurance, we would try to accommodate them, and we
2 would not, basically we would not hold it against them if
3 they used another pharmacy for that month, we would allow
4 them to come back as patients in the future if that was
5 possible.

6 We encouraged them to call the PBM. Several of them
7 did. I was present for some of these phone calls where the
8 patient would call Express Scripts and they were told various
9 things. In one particular instance the patient was told it's
10 not a problem with Express Scripts, it's Linden Care's
11 processing is wrong, and the patient was given a 1-800 number
12 to call and there would be an override code to provide.

13 So we tried that several times and finally got to be
14 about the tenth time and I'm standing there talking to the
15 patient, and I finally told the patient they're lying to you,
16 there is no override code. We're being shut out of the
17 system and there is nothing you can do. So I think Express
18 Scripts is aware because these patients are literally
19 standing in our waiting room screaming at Express Scripts'
20 employees on the phone. And this went on as recently as
21 Tuesday when I was in the office.

22 Q And can you give us a sense of how many times Linden
23 Care has received reports from patients that they've tried to
24 reach ESI about this but have had no effective response?

25 A We've had numerous phone calls. I've dealt with

1 numerous patients on this issue. Patients have told me that
2 they've been to five pharmacies to try and find medication
3 like oxycodone, oxycontin. A lot of the pharmacies they
4 don't want to carry it. If they don't have the security in
5 place that we have, if they don't have the inventory controls
6 in place that we have, the pharmacies open themselves up to
7 diversion unfortunately sometimes from unqualified employees
8 and they also open themselves up to robberies that occur.
9 There was a famous case in Suffolk County in which several
10 people were killed at a pharmacy, and what they were looking
11 for was oxycodone.

12 MS. CLARK: That's all I have. Thank you.

13 THE COURT: Cross-examination, Mr. Smith.

14 *CROSS-EXAMINATION BY MR. SMITH:*

15 Q I'm going to stand over here because I may have a few
16 documents on this machine or at least attempt to do so. You
17 spoke a little bit, sir, about the TIRF REMS. Do you know
18 how many pharmacies are enrolled in TIRF REMS?

19 A No, I don't.

20 Q Would it surprise you to know that there are over 500
21 such pharmacies across the country?

22 A Doesn't surprise me.

23 Q Would it surprise you to learn that Accredo is actually
24 not a TIRF REMS pharmacy?

25 A I honestly don't know that much about Accredo.

1 Q So you have no opinion one way or the other?

2 A I'm not sure what, what opinion you were asking me.

3 Q Sir, you mentioned your role as compliance officer at
4 Linden Care. Are you familiar with the role of a pharmacist
5 in charge?

6 A Supervising pharmacist and pharmacist in charge, yes.

7 Q So supervising pharmacist and pharmacist in charge,
8 that's basically the same thing?

9 A Yes.

10 Q So different state laws call that position something
11 different?

12 A I believe that's how it works out, yes.

13 Q And also managing pharmacist, is that another name for
14 it?

15 A I've never heard that term but I guess that's probably
16 the equivalent.

17 Q Okay. Who is the pharmacist in charge at Linden Care?

18 A Today it's Alberto Lopez.

19 Q I'm sorry?

20 A Alberto Lopez.

21 Q Would it surprise you to learn that Linden Care told
22 Express Scripts that Jordan Fogel was the pharmacist in
23 charge?

24 A At one time he was, so it would depend when this was,
25 that information was asked of Linden Care.

1 Q Sir, you understand that information that Linden Care
2 provided to Express Scripts about who it is, including its
3 pharmacist in charge, that Linden Care had a continuing
4 obligation to update that information. Did you understand
5 that, sir?

6 A Yes.

7 MS. CLARK: Objection, Your Honor. I think we're
8 getting into legal issues that are beyond the scope of the
9 witness's role at Linden Care.

10 THE COURT: Overruled at this time. But if you
11 could keep the questioning to something within this witness's
12 scope of employment.

13 Q Sir, is your role as compliance officer at Linden Care,
14 are you responsible for licensure and representations
15 concerning pharmacists in charge of your operation?

16 A We have a regulatory coordinator who handles all the
17 licensing notifications to the various states and he uses a
18 company called License Logics to assist him in that.

19 Q So, sir, are you involved in that process at all?

20 A Well, not really on a day-to-day basis, no.

21 Q Do you know if Linden Care is licensed as a mail order
22 pharmacy?

23 A In New York we're licensed as a retail pharmacy.

24 Q And ask my question broader, do you know if Linden Care
25 identifies itself as a mail order pharmacy to other states?

1 A I can't give you an answer because I don't know what the
2 other states' parameters are in terms of what designations
3 they accept.

4 Q Sir, I would like to hand you a document.

5 MR. SMITH: May I approach, Your Honor?

6 THE COURT: Yes.

7 MS. CLARK: Counsel, may I see it as well?

8 MR. SMITH: Yes.

9 Q Sir, I've handed you a document. I'll represent to you
10 that I have marked in the bottom right-hand corner numbers so
11 that we can be on the same page as we walk this document.

12 A Okay.

13 MS. CLARK: Your Honor, just so I can follow along.
14 Where is this on the exhibit list?

15 MR. SMITH: This is material for cross-examination
16 impeachment.

17 MS. CLARK: Your Honor, I object. This is not
18 something that was unanticipated, clearly should have been on
19 the list.

20 THE COURT: Mr. Smith, do you intend to seek the
21 admission of this document?

22 MR. SMITH: I may, Your Honor. It has to do with
23 some of the representations he made about what Linden Care
24 was and their practices and compliance.

25 THE COURT: Can you proceed with the question?

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1 MR. SMITH: Sure.

2 Q Sir, the first page do you see where it says New York
3 State Office of Professions, and it identifies the name
4 Linden Care?

5 A Yes.

6 Q And it says supervisor, Lopez Alberto?

7 A Right.

8 Q That's the individual you identified as the pharmacist
9 in charge of Linden Care today, correct?

10 A That's correct.

11 MS. CLARK: Your Honor, if that's the question,
12 then I do have an objection, if I may?

13 THE COURT: Yes.

14 MS. CLARK: The witness testified about the scope
15 of his employment and that this is not -- the state licensing
16 regulatory issues are handled by somebody else in conjunction
17 with I think a service or a consultant, so we're getting
18 further and further beyond the scope of this witness's
19 involvement in these issues.

20 THE COURT: Overruled at this point. Mr. Smith,
21 can you ask your next question, please?

22 MR. SMITH: Yes, Your Honor.

23 Q Sir, has Linden Care ever been disciplined or had its
24 license suspended or otherwise action taken against it by any
25 state board or pharmacy that you're aware of?

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1 MS. CLARK: Same objection, Your Honor.

2 THE COURT: Overruled.

3 A The only one that I'm aware of was, and I can't recall
4 the exact time frame that it occurred, I believe it was
5 during 2014. We had sent I believe it was a product called
6 Enlyte, which is like vitamin, some kind of vitamin
7 supplement, to the State of Oregon inadvertently when I
8 believe the license had lapsed. That's the only time, that's
9 the only incident I'm aware of where Linden Care was fined.

10 Q And that was Linden Care mail order pharmacy that was
11 shipping Enlyte?

12 A If you're -- if that's how Oregon refers to Linden Care,
13 then maybe that's the known designation that they gave in the
14 State of Oregon. I'm not sure.

15 MR. SMITH: Your Honor, may I approach?

16 THE COURT: Yes.

17 Q Sir, do you recognize this document?

18 A No.

19 Q Do you see in the top left corner it says Linden Care?

20 A Yes.

21 Q Also refers to Enlyte?

22 A Yes.

23 Q And do you see about halfway down it says, Linden Care
24 mail order pharmacy also offers a cash pay program?

25 A Yes.

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1 Q Sir, do you know, you're not testifying that this is not
2 a Linden Care document?

3 A No.

4 MS. CLARK: Objection. Objection to form. And
5 also objection to scope of witness. But also objection
6 because this isn't anything that's relevant to the
7 termination.

8 THE COURT: Sustained. And I move to strike his
9 answer. He said he is not familiar with this form.
10 Mr. Smith, would this be a good time to take a break for
11 lunch?

12 MR. SMITH: Sure.

13 THE COURT: Let me just ask Ms. Clark, how much
14 more testimony timewise do you anticipate?

15 MS. CLARK: I have one short witness and then there
16 is several patients that would like to be heard. Those will
17 be very short. And so I anticipate that we would be done,
18 I'm guessing, but maybe thirty to forty minutes.

19 THE COURT: And Ms. Hellman, do you anticipate
20 introducing evidence, and how much time do you expect your
21 evidence will take?

22 MS. HELLMAN: Your Honor, we do. I would expect
23 about 45 minutes to an hour. I'm not sure how long cross is
24 going to be, but I would guess 45 minutes.

25 THE COURT: Thank you, Counsel. Why don't we

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1 return at 1:15, that gives us an hour or lunch. And in that
2 time, Ms. Hellman and Mr. Smith, could you decide if you have
3 any objection to the recorded telephone conversation?

4 MS. HELLMAN: Yes.

5 THE COURT: Thank you.

6 (Recess at 12:15.)

7 (Reconvene at 1:20.)

8 THE COURT: Let me ask defense counsel, have you
9 had an opportunity to listen to P17?

10 MS. HELLMAN: We have, and we have no objection.

11 THE COURT: P17 then will be admitted into
12 evidence.

13 (Plaintiff's Exhibit 17 received in evidence.)

14 MR. COST: May I? Defense counsel indicated they
15 had some trouble playing the DVD. It could be a bad copy.
16 If the Court has the same problem, let me know and we'll get
17 you a copy right away.

18 THE COURT: Yes, thank you very much.

19 MS. CLARK: Your Honor, will we be playing that in
20 the courtroom?

21 THE COURT: I don't think we need to play it in the
22 courtroom.

23 MS. CLARK: That's fine with me.

24 THE COURT: And was it Mr. Kersey who was on the
25 witness stand. Mr. Kersey, could you step up? Mr. Kersey,

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1 you understand you're still under oath.

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: You may proceed, Mr. Smith.

4 *BY MR. SMITH:*

5 Q Mr. Kersey, you're the chief compliance officer at
6 Linden Care, correct?

7 A Yes, sir.

8 Q And as chief compliance officer, compliance with state
9 and federal law, with respect to those issues, the buck
10 ultimately stops with you at Linden Care, correct?

11 A Yes.

12 Q And you mentioned several people before that do some
13 subsidiary compliance issues. Those people report to you?

14 A Yes, that's right.

15 Q Sir, would it concern you as chief compliance officer of
16 Linden Care if Linden Care was sending drugs into states
17 where it was not licensed?

18 A Would it concern me, yes.

19 Q And Linden Care is not licensed in the State of
20 California, is it, sir?

21 A No, it's not.

22 Q Sir, you're aware that Express Scripts terminated Linden
23 Care in part because it was sending prescriptions into the
24 State of California where it was not licensed, correct?

25 A I have been made aware of that, yes.

1 Q And as chief compliance officer, after you were made
2 aware of the fact that Express Scripts terminated its
3 contract with Linden Care because Linden Care was sending
4 prescriptions into a state that it was not licensed in, did
5 you do any investigation?

6 A I haven't had the opportunity to investigate the
7 incidents. No one has yet told me the name of the patient or
8 the incident that supposedly happened.

9 Q So it's your understanding there was a single incident,
10 single shipment?

11 A I honestly don't know if there was a single shipment or
12 not.

13 Q Is it your understanding or are you aware that your
14 company has taken the position in this litigation that any
15 shipments were diminimus and were for members who were
16 vacationing in California?

17 A That's my understanding, yes.

18 Q Sir, would you agree with me that someone whose
19 insurance carrier is the California Association of Highway
20 Patrolmen and lists as his or her residence Escondido,
21 California probably isn't vacationing?

22 MS. CLARK: Objection, Your Honor. I don't know
23 how this witness can understand and respond to that question.

24 THE COURT: Sustained.

25 MR. SMITH: Your Honor, I have a exhibit that I can

1 show the witness if I can approach the Court before I present
2 it, if that's okay.

3 THE COURT: Yes.

4 MR. SMITH: Counsel, I may want to approach as
5 well.

6 THE COURT: Can you hand it to my courtroom deputy,
7 please?

8 MR. SMITH: Sure.

9 THE COURT: Let me just ask, Mr. Smith, is this the
10 first time that Linden Care is seeing this evidence?

11 MR. SMITH: It's Linden Care claims data, it's from
12 our system but they should have the information, Your Honor.

13 MS. CLARK: Your Honor, it's not on the exhibit
14 list. But even more importantly, you know, we asked when we
15 got the notice of termination, we inquired about what are you
16 talking about, what are the claims you're talking about.

17 They never gave us any of this information. This does not
18 look like it is anything from Linden Care. This is ESI data.

19 So, you know, it's particularly unfortunate that
20 they didn't give us this information at the time that we
21 asked for it. They certainly shouldn't be able to spring it
22 on us in this hearing, especially when it's not our document,
23 I don't think that's a correct statement.

24 THE COURT: Mr. Smith, is this the Court's copy or
25 is this the copy you need?

1 MR. SMITH: Yes, but I wanted to explain something
2 about it. Your Honor, what I wanted to explain about this
3 data is that it has some sensitive patient information on it.
4 We have redacted to protect patient identifications under
5 HIPAA. We've redacted some information about the member's
6 first name and last name but we've left in address, carrier,
7 the pharmacy and other identifying information. Out of an
8 abundance of caution we would ask that this exhibit still be
9 treated as confidential. And that's just a concern that it
10 could be potentially used to identify somebody's, a member's
11 health information.

12 THE COURT: And has this witness seen this exhibit
13 before?

14 MR. SMITH: I do not believe so, Your Honor.

15 THE COURT: I'm not sure what you want to ask this
16 witness about a document that Express Scripts has prepared.
17 It seems to me that this may be evidence that Express Scripts
18 seeks to introduce as it presents its case, but I'm not sure
19 what this witness can tell you regarding this exhibit that is
20 prepared by Express Scripts.

21 MR. SMITH: So I was simply wanting to cross the
22 witness or establish, I mean these are scripts that were sent
23 to California. These are records of Linden Care scripts, and
24 I believe they contradict representations that Linden Care
25 has made in this litigation about the nature of the

1 shipments, and I think this witness has testified he believed
2 it was a shipment. There has been statements by counsel and
3 statements by declarants in the case that any shipments were
4 diminimus and vacation.

5 My purpose with this exhibit is solely to establish
6 that there are numerous examples in here to establish that
7 these were not -- there were numerous shipments, shipments
8 over multiple months, and therefore every one of these
9 residents has California as their residency.

10 THE COURT: Mr. Kersey, do you have any information
11 about any drugs that Linden Care shipped to California?

12 THE WITNESS: No, Your Honor.

13 THE COURT: The objection is sustained.

14 MR. SMITH: Okay.

15 Q Mr. Kersey, at the end of the day as chief compliance
16 officer for Linden Care, would you be concerned if there was
17 information showing that Linden Care had shipped numerous
18 prescriptions to California residents during periods when it
19 was not licensed?

20 A I can't say that I would be concerned because you say
21 California residents, because the first thought that comes to
22 my mind is that we have multiple patients that have more than
23 one residence. They live part of the year, for example, in
24 New York and part of the year in Florida. So we take care of
25 their medication all year-round. Sometimes their doctor in

1 New York sends us a prescription, sometimes their doctor in
2 Florida sends us prescriptions. We have other patients from
3 the New York area that have vacation homes in other states.
4 And the facts that you've given me about a California
5 insurance plan, I don't know where the patient lives. I
6 don't have enough information to decide whether I would be
7 concerned or not.

8 Q Is it your testimony today that California exempts
9 pharmacies from licensure if they are shipping to someone's
10 vacation home?

11 A No, that's not my testimony.

12 MR. SMITH: I have no further questions, Your
13 Honor.

14 THE COURT: Anything further, Ms. Clark?

15 MS. CLARK: Just a quick follow-up on those last
16 few questions.

17 REDIRECT EXAMINATION BY MS. CLARK:

18 Q When Express Scripts terminated Linden Care last Tuesday
19 citing the shipment of drugs to California, did they indicate
20 what patients or claims those related to?

21 A No.

22 Q Did they give Linden Care any information that would
23 help it respond in any way?

24 A No.

25 Q In a meaningful way to those claims?

1 A No.

2 Q Did it conduct an audit or investigation with Linden
3 Care of those accusations?

4 A Not that I'm aware of.

5 Q It just terminated Linden Care, that's right?

6 A Yes, ma'am.

7 MS. CLARK: Thank you.

8 THE COURT: Anything further, Mr. Smith?

9 MR. SMITH: No, Your Honor.

10 THE COURT: Thank you, Mr. Kersey. You may step
11 down. Ms. Clark, you may call your next witness.

12 MS. CLARK: At this time I'm going to yield to
13 Mr. Cost.

14 MR. COST: We have -- this goes on our witness
15 sheet several patients. We're not intending to call all of
16 them, there are some we would like to hear from. I have
17 protect their identities, we put them as their initials. I
18 have their names and addresses that I will give to counsel so
19 that they know who is on there. I have the phone numbers for
20 the Court to contact as well. And I'll just go one at a
21 time, if that's okay.

22 THE COURT: Yes.

23 MR. COST: I passed up a copy to the Court of their
24 names and addresses.

25 THE COURT: Mr. Cost, at this time are you asking

Arthur Kersey - Cross - Mr. Smith

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1 the courtroom deputy to contact the first witness on the
2 list?

3 MR. COST: Actually, Your Honor, if you give me one
4 second I'm going to -- I believe we're going to contact
5 Ms. P [REDACTED] first.

6 THE CLERK: Is it P [REDACTED]?

7 MR. COST: P [REDACTED].

8 THE CLERK: Ms. P [REDACTED]. This is Renata with Judge
9 Sannes' chambers. We're in Court and the judge is going to
10 speak now.

11 THE WITNESS: The judge's chambers? I just didn't
12 catch the last part of what you said.

13 THE COURT: Ms. P [REDACTED]?

14 THE WITNESS: I just didn't capture the last part
15 that you said.

16 THE COURT: Ms. P [REDACTED], this is Judge Sannes. And
17 the attorneys for Linden Care have asked that you testify via
18 telephone in a proceeding that we have right now.

19 THE WITNESS: Yes. Yes. Yes, I'm aware of that.
20 Let me just get. I just had surgery so let me just get my
21 other position and I can talk to you, in the other area, hold
22 on one minute. Okay? Can you hear me?

23 THE COURT: Ms. P [REDACTED], before we proceed, my
24 courtroom deputy is going to place you under oath.

25 THE WITNESS: Okay. I just want to say that you

1 sound like you're echoing. Can you just come a little
2 closer? Are you on speaker? You can swear me in, it's just
3 you're echoing.

4 **K [REDACTED] P [REDACTED]**, called as a witness and being
5 duly sworn, testifies as follows:

6 *DIRECT EXAMINATION BY MR. COST:*

7 Q Ms. P [REDACTED], this is David Cost. I'm an attorney for
8 Linden Care. Can you hear me?

9 A Yes, that's fine.

10 Q Could you state your full name for the record, please?

11 A K [REDACTED] A. P [REDACTED].

12 Q And K [REDACTED], where do you live?

13 A [REDACTED], Lake Grove, New York 11755.

14 Q Ms. P [REDACTED], are you currently a patient that uses Linden
15 Care Pharmacy?

16 A Yes, I am.

17 Q And how long have you used Linden Care?

18 A Since, continually since '09 with no one else.

19 Q Can you please just give the Court the current
20 conditions that you have, either diseases or injuries?

21 A Yes. I have a arachnoiditis in my lumbar area after a
22 spinal fusion that went wrong and I had severe.

23 Q Ms. P [REDACTED], I'm going to stop you for a second because
24 the court reporter is having trouble keeping up with you.

25 A Okay. That's no problem. I'll go slower hold on a

K [REDACTED] P [REDACTED] - Direct - Mr. Cost

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1 moment. Now I can hear.

2 Q Ms. P [REDACTED], if you can speak slowly, and if it's a big
3 word, if you would spell it out for the reporter, I'm sure
4 she would appreciate that.

5 A Where do you want me to start from at this point?

6 Q After the failed spinal fusion.

7 A After the failed spinal fusion, I was diagnosed with
8 arachnoiditis, which is A-R-A-C-H-N-O-I-D-I-T-I-S. And also
9 with swelling in all of the nerve roots in the lumbar area.

10 Q Ms. P [REDACTED], did you recently have an accident?

11 A Yes. On July 11th in 2015, in the morning on that
12 morning I was hit, rear-ended in a vehicle as a passenger in
13 the front seat. And we were hit from behind and going
14 approximately 55 miles an hour, and I had a fracture to my
15 neck cervical area with my spinal cord bruised, a third of
16 the spinal cord was bruised.

17 Q Are you currently immobile, bedridden?

18 A Could you just repeat that?

19 Q Are you currently bedridden?

20 A Yes. I mean, I'm in bed in my home in the hospital bed.

21 Q And do these conditions that you have cause you pain?

22 A Severe pain. I went through a surgery, just I'm
23 recovering from a decompression surgery of the C2 to C5 and
24 they just done on September 16th, where they put rods and
25 screws as well as took apart the axim, A-X-I-M, bone to use

K [REDACTED] P [REDACTED] - Direct - Mr. Cost

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1 for my neck as well as cadaver bones.

2 Q And Ms. P [REDACTED], what medications do you get from Linden
3 Care for your pain conditions?

4 A Okay. I am receiving MS contin. Do you need the doses?

5 Q No, we don't need the doses.

6 A MS contin extended relief. I have Actiq, A-C-T-I-Q,
7 which is a fentanyl base. I have Dilaudid, D-I-L-A-U-D-I-D.
8 I have Neurontin. Actually, I'm sorry, excuse me. There is
9 a newer brand so I'm going to tell you what they're giving me
10 now. It's called Horizant, H-O-R-I-Z-A-N-T. I'm on
11 Klonopin, K-L-O-N-O-P-I-N. I'm also on Cymbalta,
12 C-Y-M-B-A-L-T-A. Baclofen, B-A-C-L-O-F-E-N.

13 Q Ms. P [REDACTED], I think you've given us enough of the list
14 for the Court.

15 A Okay. And I have other.

16 Q And that's fine. Ms. P [REDACTED], have you ever had any
17 complaints about Linden Care service?

18 A Absolutely not.

19 Q Have you had -- does your doctor recommend Linden Care?

20 A Actually, they have moved there, but I actually grew up
21 in the town that they originally had. They were in Delmar,
22 New York, and I had used them just for a regular pharmacy
23 when I was growing up. And then coincidentally later on in
24 my life when this happened, they have moved next to my pain
25 management office, Dr. Weingarten, and I started using them

K [REDACTED] P [REDACTED] - Direct - Mr. Cost

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1 at the time they moved over there.

2 Q So you used Linden Care even before Dr. Weingarten
3 because they were your neighborhood pharmacy, is that right?

4 A Yes. Because I grew up in Delmar and they were in the
5 Delmar area.

6 Q Does Linden Care besides prescribing your drugs do any
7 other services for you?

8 A Yes. I don't know what I would do without them.
9 They're a patient advocate for me for helping when
10 prescriptions aren't being put through for, you know, for
11 prior approval. They will work the entire day, if not days,
12 to get the medication for me approved. And they have gone
13 above and beyond to get medications. They have come out to
14 me on Christmas Eve and given me my medications because they
15 weren't going to be open. And I can honestly say that they
16 are -- they are the liaison that helps me with everything
17 when I can't move. And they do everything for me.

18 Q Ms. P [REDACTED], have you ever been notified by Express
19 Scripts about Linden Care being terminated from their
20 network?

21 A I received -- can you hold on one moment? I'm going to
22 get the actual thing. They're right here, hold on one
23 moment. First let me just tell you what I have received.
24 Like I said, because I can't move, my husband is getting the
25 other documents. I can reach a document here on

K [REDACTED] P [REDACTED] - Direct - Mr. Cost

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1 October 25th. It says, Express Scripts, your pharmacy
2 benefit manager, has worked with your health plan to manage
3 our prescription drug benefits, fashion prescriptions that
4 we -- that were submitted on behalf for payment. Please
5 review the attachment for accuracy. And something about
6 returning the form.

7 Q Let me, I understand. So let me just see if I can, you
8 received a letter dated in October. Let me ask you, does
9 that letter say anything that Express Scripts is terminating
10 Linden Care?

11 A This one does not say anything about Linden Care, not
12 using Linden Care. This is actually about all the
13 medications and did I receive them or not. And now my
14 husband gave me the other documents that we received. This
15 is the one he just handed me.

16 Q What are you looking at now?

17 A My husband just handed them to me. They sent a letter
18 that states in summary about the medication and what
19 medications can be sent directly to them. I mean, I'm
20 summing it up at this point.

21 Q And does that letter say anything about --

22 A It doesn't say Linden Care. It's just -- it's
23 basically, I mean, to me I would interpret it as to be I
24 would be using them through my plan or through whatever not
25 knowing that they are who they are. I don't know who they

K [REDACTED] P [REDACTED] - Direct - Mr. Cost

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1 are, you know what I'm saying. I never heard of them outside
2 of this before.

3 Q And Ms. P [REDACTED], again, do either of those documents say
4 that they're terminating Linden Care and you can't use them
5 as a pharmacy?

6 A No. They haven't said that I can't use them but I was
7 told yesterday I couldn't, when I went to fill my medications
8 I was told it was terminated.

9 Q And --

10 A And I was not able to. But they said that they were
11 willing to fill my scripts for me and, you know, do whatever
12 to help me out and so that I wouldn't be without medication.
13 I wasn't made aware of the issue with this until yesterday.
14 As far as, you know, taking care of my medications for me.

15 Q And Ms. P [REDACTED], are there any other pharmacies you know
16 to your knowledge in your area where you can get your
17 medications?

18 A Okay. I want to say, I want to say that unlike the
19 chain pharmacies, the chain pharmacies, for lack of a better
20 term, but like a CVS or a Rite Aid or Walgreens, they cannot
21 fill or carry at least in our area any of these. They will
22 not order them or get them for me if I bring them in a week
23 before. So if there are some that are, they're very far away
24 from me. I mean, I would say that the closest one for me has
25 got to be at least, I would say at least an hour. It would

K [REDACTED] P [REDACTED] - Direct - Mr. Cost

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1 be an hour to get there and get back. Well, an hour there
2 and an hour back, which I wouldn't be able to do.

3 You know, Linden Care takes care of all of that for me.
4 You know, Linden Care not only takes in my scripts with my
5 physicians, I use no other pharmacy for anything, for
6 anything at all. I use them strictly for 100 percent of my
7 medication for everything. So they deliver to me, they ship
8 it to me, you know, they deal with any problem. They call me
9 to check on me. I mean, I don't know what I would do without
10 them, to be honest with you.

11 Q Ms. P [REDACTED], let me ask, if you couldn't get your
12 medications from Linden Care, I think you said you don't know
13 what you're going to do, is that right?

14 A Actually, honestly, the thought of it even yesterday had
15 me upset because I don't know. I am not in a position to
16 even think about it with what I've just learned from now.
17 Like I said, I barely can use my arms. I barely can use my
18 legs. I'm in a full brace and I --

19 Q Ms. P [REDACTED] --

20 A And they take care of everything.

21 Q Ms. P [REDACTED], if you don't get your medications, what kind
22 of conditions will you suffer?

23 A Not to sound dramatic, I could die. It could be fatal.
24 It could be fatal.

25 Q Ms. P [REDACTED], thank you. I don't have any further

K [REDACTED] P [REDACTED] - Direct - Mr. Cost

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1 questions for you. Another attorney in the room might have
2 some questions.

3 A Thank you.

4 *CROSS-EXAMINATION BY MS. HELLMAN:*

5 Q Ms. P [REDACTED]?

6 A Yes.

7 Q Hi. My name is Sarah Hellman. I'm an attorney
8 representing Express Scripts. Can you hear me okay?

9 A Yeah, I can. Yes, I can.

10 Q Thank you. First of all, I want to thank you for your
11 time today and taking the time to testify. It doesn't sound
12 like you're feeling very well.

13 I just have a couple of questions for you, Ms. P [REDACTED].
14 It sounds like the first time that you learned that Linden
15 Care was no longer an in-network pharmacy provider, was that
16 yesterday when you went to Linden Care?

17 A Yes. I had a doctor's appointment, my physician
18 appointment, and on the way back my husband brought in the
19 scripts to them and he came out and told me about there was a
20 problem. And then Linden Care, the people that work there,
21 came out and spoke to me about what was going on, but that I
22 shouldn't worry, that they would take care of it until they
23 knew what was going to be going on. And I didn't know what
24 was happening at that point.

25 Q And when you said Linden Care told you what was going

1 on, what did Linden Care tell you?

2 A That at this point that they just were -- my husband is
3 repeating it. He said that because my Medicare provider uses
4 Express Scripts to manage my medicines and due to a legal
5 issue, that's all they said, they didn't give any specifics,
6 that they were unable to fill my medications under my plan.
7 But would give a seven day supply of anything that I needed
8 and by then hoped that they would have it rectified or would
9 do whatever they could do to help me figure something out, to
10 work with me.

11 Q Thank you. And did Linden Care tell you that you may
12 have to find an alternative in-network pharmacy?

13 A Not at that point they didn't say anything at all.

14 Q Did Linden Care tell you that Express Scripts had
15 requested the names of people that were having difficulty
16 getting their prescriptions?

17 A Just repeat that one.

18 Q Sure. Did Linden Care tell you that Express Scripts had
19 requested the names of any members that were having
20 difficulty getting their prescriptions?

21 A No. No. Nothing other than just the fact that there
22 was some issue. I didn't even actually know what the issue
23 was. You know, I didn't -- they didn't fully tell me what
24 they were. It was between them in particular, them being
25 Linden Care, with the company, and I didn't know if it was --

K [REDACTED] P [REDACTED] - Cross - Ms. Hellman

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1 you know, I don't know how much they would divulge to us, to
2 a patient that comes there, that's their business. So, no,
3 it just, it really was directed toward my plan, my situation,
4 and that at this time they were not able to fill it and they
5 were -- they would let me know. They would give me a week's
6 worth, like I say, seven day supply of anything, and actually
7 not even charge me for it at that point. And I don't want to
8 jump to this, that's another thing that I don't know what I
9 would do. Is the other attorney there that I can say
10 something to finish with to go back, I just want to say
11 something. But that's all I was really told yesterday and
12 then I was asked if I could just tell them what my
13 relationship was with Linden Care, so I was asked yesterday
14 afternoon. So that's all, I mean, that's really all, that's
15 all I really know about it.

16 Q And Ms. P [REDACTED], it sounds like you've used Linden Care
17 for several years, is that correct?

18 A Yes.

19 Q And it sounds like typically, I know you're in the State
20 of New York, they ship there, your prescriptions to you?

21 A They deliver them to my home, they overnight them when
22 they're for a weekend, Friday to Friday, and it's overnight
23 by coming the next morning.

24 Q And Ms. P [REDACTED], I guess since you haven't used any other
25 pharmacies, you don't know if other pharmacies can offer you

1 those same services, is that true?

2 A No, I actually do. You know, I actually when I had this
3 happen was researching, and I couldn't find. I was trying to
4 originally look for someone that was close to the home,
5 closer, you know, for us to get stuff, and they wouldn't even
6 discuss the medications with me. It was an absolute we won't
7 even order them for you and get them in, get them in for you
8 five days or so that they would take to deliver.

9 The closest other pharmacy, like I said, that I knew was
10 in about an hour, an hour or so drive. Yeah, about an hour
11 or so drive one way. Don't even know if they would even
12 carry the medication. And I also had a medication that I was
13 on that they filled directly, which was Subsys, which was on
14 November 15th will stop. You know, they were dealing with
15 this directly and letting me, you know, even with my other
16 medications, they weren't letting me hold \$10,000 if it
17 wasn't covered, they would go up to \$10,000 and let me pay
18 them off. I mean, I don't know anybody that could do that
19 for me. You know, it's not covered under Medicare part D.

20 Q Ms. P [REDACTED], have you called Express Scripts and inquired
21 about any other possible pharmacies for you?

22 A No. I actually -- like I said, I only, you know, have
23 the information as far as this happening as of late yesterday
24 afternoon.

25 MS. HELLMAN: I have no further questions. Thank

R [REDACTED] P [REDACTED] - Cross - Ms. Hellman

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1 you.

2 THE COURT: Anything further, Mr. Cost?

3 MR. COST: No, Your Honor. Thank you, Ms. P [REDACTED].

4 THE COURT: Thank you very much, Ms. P [REDACTED].

5 THE WITNESS: Thank you very much. If you need
6 anything else, please don't hesitate to call.

7 THE COURT: Thank you.

8 THE WITNESS: Thank you. Have a good day.

9 MR. COST: Your Honor, plaintiffs call next R [REDACTED]
10 G [REDACTED].

11 THE CLERK: Mr. G [REDACTED]?

12 THE WITNESS: Yes, it is.

13 THE CLERK: This is Renata with Judge Sannes'
14 chambers.

15 THE COURT: Mr. G [REDACTED], the attorneys for Linden
16 Care have indicated that you would testify as a witness today
17 by telephone.

18 THE WITNESS: Absolutely, yes. It's a little hard
19 to hear you. If you're on speaker phone, if you could get
20 closer to the speaker.

21 THE COURT: Yes. Right now my courtroom deputy
22 will place you under oath.

23 THE CLERK: Mr. G [REDACTED], I'm going to place you under
24 oath now. Okay.

25 THE WITNESS: Okay. This is much better.

R [REDACTED] P [REDACTED] - Cross - Ms. Hellman

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1
2
3 R [REDACTED] G [REDACTED], called as a witness and being
4 duly sworn, testifies as follows:

5 DIRECT EXAMINATION BY MR. COST:

6 Q Mr. G [REDACTED], this is David Cost. I'm an attorney for
7 Linden Care. How are you today?

8 A I'm okay. A little bit of back pain, Mr. Cost, but it's
9 all right, I'm happy to help.

10 Q Mr. G [REDACTED], could you state your full name for the
11 record?

12 A Sure. R [REDACTED] W. G [REDACTED].

13 Q And Mr. G [REDACTED], where do you live?

14 A I'm in Kirkland, Washington. The address is [REDACTED]
15 [REDACTED]

16 Q Going forward, we have a stenographer who is trying to
17 take down your testimony and the connection is okay. If you
18 could please speak slowly, and if there is any big words, if
19 you could spell it for the stenographer, we would appreciate
20 it.

21 A That would be fine, yes. You can also if you want you
22 can call maybe on my land line, it might be a little bit
23 better than my cell phone. It's up to you.

24 Q Let's try this and we'll try that if we get to it.

25 A All right. I apologize.

R [REDACTED] G [REDACTED] - Direct - Mr. Cost

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1 Q Mr. G [REDACTED], are you currently a patient of Linden Care?

2 A Yes. Both my wife and I use Linden Care to fill the
3 medications.

4 Q And how long have you been a patient of Linden Care?

5 A For almost two years now. January of 2014 when we
6 started.

7 Q What current conditions do you and your wife have that
8 cause you pain?

9 A Well, for myself it is severe lower back pain, and also
10 I have something wrong with my gut that causes me extreme
11 nausea, and diagnosed ADHD. For my wife it is very severe of
12 chronic abdominal pain and caused by other issues, and she
13 also does take an ADHD medication.

14 Q Mr. G [REDACTED], do you receive controlled medications for
15 these conditions?

16 A Yes, that's right. For myself it's oxycodone, and for
17 my wife it's a variety of sort of baseline pain medication
18 and what they call breakthrough pain medication. And in
19 particular one medication is called Fentora, is quite unique
20 for her serious issues.

21 Q Mr. G [REDACTED], did your doctor recommend Linden Care?

22 A Yes. I believe we did get the reference to Linden Care
23 from our doctor in Scottsdale, Arizona.

24 Q If you don't have these medications, what conditions
25 would you and your wife sustain if you don't have your

R [REDACTED] G [REDACTED] - Direct - Mr. Cost

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1 medications?

2 A Well, for me it would be, you know, basically
3 dis-functionality and being quite disabled because the lower
4 back pain, and probably the nausea would be so severe that I
5 really couldn't function very well. For my wife it would be
6 she would be in the emergency room within a week, and that's
7 based on previous history of eight, nine years.

8 Q Mr. G [REDACTED], have you ever had any complaints about Linden
9 Care?

10 A I think only once. And I think Linden Care is really a
11 very unique pharmacy based on what they do and a lot of other
12 reasons, I have nothing but praise. But, yes, they missed a
13 medication and it slipped through the cracks, and that's the
14 only time I've been upset with anyone at Linden Care because
15 of the severity of missing medications.

16 Q And did they rectify that when you brought it to their
17 attention?

18 A Oh, yes. Oh, yes, absolutely. They, you know, in this
19 particular case they said, oops, we goofed, and we'll get it
20 to you. And one of the unique things about Linden Care, they
21 will FedEx overnight priority, which means you can get it as
22 fast as is possible. And finding it at a local pharmacy,
23 some of the drugs is near impossible.

24 Q So you've looked at other pharmacies to where you can
25 get these drugs and haven't found any, is that right?

R [REDACTED] G [REDACTED] - Direct - Mr. Cost

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1 A That's correct. Over the years, over eight, nine years
2 we have found that the larger pharmacies have their benefits,
3 but they do not understand in particular pain management.
4 And I feel that they're controlled substances, and I
5 understand all of that and I appreciate all of that and I
6 support all of that, but it causes a movement of unfortunate
7 people like us for our needs to go toward the independent
8 pharmacies who are smaller and who can develop this expertise
9 and develop the inventory and develop the knowledge of what
10 patients like us need and go through.

11 Q And besides filling your prescriptions, does Linden Care
12 provide additional services that you value?

13 A No. The only thing that Linden Care does is fills the
14 prescriptions and ships them out to us as prescribed by our
15 doctor.

16 Q And again, do they take care of your authorizations?

17 A They do. Some pharmacies won't even touch insurance,
18 but Linden Care does as much as possible dealing with the
19 insurance company.

20 Q Have you ever -- have you had any contact from Express
21 Scripts about Linden Care being terminated from its network?

22 A None whatsoever. I hear from Express Scripts every once
23 in a while. I don't directly deal with them. Sometimes I'll
24 get a note that says, Mr. G [REDACTED], did you get controlled
25 prescriptions through the mail order process. They'll say

R [REDACTED] G [REDACTED] - Direct - Mr. Cost

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1 it's not due yet, and, you know, basically keeping scripts up
2 to date. They never said a word about Linden Care.

3 Q Are you aware of any 1-800 numbers you can call at
4 Express Scripts?

5 A Could you repeat that?

6 Q Are you aware of any 1-800 numbers you can call at
7 Express Scripts for inquiries?

8 A Oh, yeah. Yeah. I couldn't tell you what they are, but
9 whenever I need to, and one of the benefits of the big
10 companies is I can get drug history and all that kind of
11 stuff, and there is customer service, just like anything, you
12 dial the 800 numbers and you get voice activated response
13 system that take you, you know, forever to find somebody.
14 But yeah, I'm sure, I'm aware that they have them.

15 Q Have you tried contacting Express Scripts with regard to
16 Linden Care's termination?

17 A No, not at all. No. Express Scripts to me is not
18 really part of the picture other than other medications and
19 monitoring our medication history. I don't really deal with
20 them direct at all.

21 Q Is Linden Care continuing to fill your prescriptions?

22 A Yes. Last Monday they filled the prescription and I
23 have sent them some scripts that will be going out today and
24 I expect them to be able to -- I see no reason that they
25 won't fill those medications.

R [REDACTED] G [REDACTED] - Direct - Mr. Cost

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1 Q Is part of the reason why you haven't contacted Express
2 Scripts because you're still getting your prescriptions
3 filled?

4 A I haven't talked with Express Scripts at all for about a
5 year.

6 Q My question is, is that reason because you're getting
7 your prescriptions still filled and there is still
8 continuity?

9 A Yes, absolutely. Linden Care has been fabulous to me.
10 And I'm sorry I don't mean to sound like that, but I have so
11 much experience as a patient and as a caretaker for my wife,
12 that Linden Care really honestly is a godsend. Their
13 inventory, their staff, their knowledge, their commitment to
14 filling prescriptions on time, sending out shipments. It's
15 by far the best independent pharmacy that I've worked with,
16 and I've probably worked with four of them over the last
17 eight years.

18 Q If you can't use Linden Care any more, do you know what
19 you're going to do?

20 A Well, probably, honestly suffer. I'll watch my wife
21 suffer. Take my wife to the ER within the next week or two
22 and go on the search for an independent pharmacy, going back
23 to my doctor's office or some other source to see if I can
24 find any pharmacy which will meet our needs. I'm hoping it
25 doesn't happen.

R [REDACTED] G [REDACTED] - Direct - Mr. Cost

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1 MR. COST: Thank you. I have no more questions for
2 you.

3 THE COURT: Ms. Hellman.

4 CROSS-EXAMINATION BY MS. HELLMAN:

5 Q Mr. G [REDACTED]?

6 A Yes.

7 Q Hello. My name is Sarah Hellman. I'm one of the
8 attorneys representing Express Scripts. Can you hear me
9 okay?

10 A Oh, yeah. Absolutely Sarah, thank you.

11 Q I just have a few questions for you today.

12 A Sure.

13 Q Mr. G [REDACTED], it sounds like the last time you had a
14 prescription filled at Linden Care was last Monday, is that
15 correct?

16 A I believe I said that's the date actually received it,
17 so it was probably filled the previous Friday. I think. I
18 would have to go back and look at my records, but that's I
19 think so.

20 Q And I just want to be sure I'm clear. When you say last
21 Monday, you're talking about almost two weeks ago, is that
22 right?

23 A Actually, Tuesday, Friday. No, actually last Monday.

24 Q As in four days ago?

25 A Yes.

R [REDACTED] G [REDACTED] - Cross - Ms. Hellman

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1 Q Okay. That's what I was trying to understand. And --

2 A I'm sorry, unfortunately a lot of times we get some of
3 these medications on demand and that's one of the things
4 about Linden Care, and because of that I kind of lose track.

5 Q And Mr. G [REDACTED], how did you learn that Linden Care had
6 been terminated from the Express Scripts pharmacy network?

7 A I learned about -- I was filling a prescription, maybe
8 it was the last one, maybe it was the previous week, things
9 got kind of strange with Linden Care. There seems to be an
10 insurance problem. There is always insurance problems so I
11 didn't think too much about it. And then they were asking me
12 if I might contribute to something like an affidavit or
13 whatever, and I didn't really know what it was about. And
14 then I talked with Mark Schumer about this request for the
15 written document, and he said I'm sure you've heard about
16 this, and I said, no, I haven't heard a thing. So we went on
17 and talked about the document. And I did that. And then I
18 just searched on the web for Linden Care and Express Scripts
19 and I found it. It was, well, more than one lawsuit at that
20 point. So I found out about it after the fact of filing of
21 the Express Scripts lawsuit.

22 Q Mr. P [REDACTED] --

23 A I found out about it from the VP of Linden Care. I
24 found it from the web. I went out and searched the web after
25 Mark said something.

R [REDACTED] G [REDACTED] - Cross - Ms. Hellman

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1 Q Mr. P [REDACTED], the VP of Linden Care reached out and asked
2 for you to I think you said give an affidavit, correct?

3 A Well, Mindy, I forgot her right name, had asked me
4 questions about it. I've been getting feedback from Linden
5 Care for I don't know about six months via surveys, via
6 requests, direct requests from some of the people there, and
7 I've always said, you know, I think you guys are great, if
8 there is anything I can do ever to help you to pay you back
9 in a way, not pay them, but to help them, I've been saying
10 that. And then it came up, so I just said I'm glad you asked
11 me to do it because I've been asking how I can help for a
12 long time.

13 Q And Mr. G [REDACTED], you did submit a typed written
14 declaration in this case, correct?

15 A I had it notarized here in the State of Washington sent
16 to the office of Linden Care.

17 Q And Mr. G [REDACTED], in that declaration you indicated that
18 after speaking with your doctor, you want to keep using
19 Linden Care, correct?

20 A Yeah. After speaking with my doctor I continued to use
21 Linden Care, that is correct.

22 Q And I think --

23 A I didn't quite hear what you said.

24 Q I think you testified you wanted to keep using Linden
25 Care after speaking with your doctor because you like this

R ■■■ G ■■■ - Cross - Ms. Hellman

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1 pharmacy, correct?

2 A Yes. Absolutely. I can't life without Linden Care. I
3 don't mean to be -- I'm passionate about it.

4 Q And Mr. G ■■■, do you know if there is any other -- the
5 smaller pharmacies that you talked about, do you know if
6 there is any smaller pharmacies in the country that can mail
7 these prescriptions to you?

8 A I do not know of the name of a pharmacy that can do
9 this. As I said over the last eight, nine years, I've gone
10 through a couple different independent pharmacies but
11 something always comes up, and because of the severe, rightly
12 so severe regulations on a lot of these medications, that
13 prescriptions, shipping medications across state just even
14 filling these sort of prescriptions in the quantity that my
15 wife needs, it's just I don't know where I would go. I would
16 have no idea. I would have to go back to the doctor's
17 office. Drug representatives, you know, from different drugs
18 because it's not a question of pharmacy, it's a question of
19 what are the effective drugs especially for my wife.

20 Q And Mr. G ■■■, I think you've testified that you haven't
21 gone on Express Scripts' website or called them, correct?

22 A I'm sorry, Sarah.

23 Q Let me talk louder. You testified that you haven't gone
24 on the Express Scripts' website or called Express Scripts,
25 correct?

R [REDACTED] G [REDACTED] - Cross - Ms. Hellman

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1 A I haven't done what with Express Scripts?

2 Q Mr. G [REDACTED], have you gone on the Express Scripts'
3 website, the one that you talked about earlier?

4 A I'm sorry. Yes. I go on the website for Express
5 Scripts probably, probably once a week, if not every other
6 week, because being a big company, they have a marvelous
7 resource on the website, and it allows me to track our
8 medication and history and our costs al all that stuff. So
9 it's actually, it's a tremendous resource for me. And it's a
10 type of resource that independent pharmacies because of their
11 size I think that they can't provide.

12 Q And have you gone on that website specifically to see
13 about an alternative pharmacy?

14 A Not within, not within the time I've been using Linden
15 Care. When my previously independent pharmacy, called
16 Evergreen Pharmacy, were going to close, and they weren't
17 sure how they were going to deal with closing, I did search
18 for alternate pharmacies. I did not find -- I didn't find
19 anything that sounded right through the website of Express
20 Scripts, so at that point I said to my doctor, I said, look,
21 we pay you a lot of money to do stuff for us and I think you
22 need to do it. It had to be done really honestly within a
23 week or to two.

24 Q And Mr. G [REDACTED], I'm just about done. It sounds like
25 you've had some communications with the people at Linden

R [REDACTED] G [REDACTED] - Cross - Ms. Hellman

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1 Care. Have they told you at any time in the past two weeks
2 that you may need to find an alternative pharmacy?

3 A No, not at all. Actually it's the opposite. They have
4 committed to fill our medication needs and I've said to them,
5 look, if you need to tell me to find another way of filling
6 some or all of these medications, tell me as soon as possible
7 because of the urgency and severity of dropping care and the
8 time it takes to find. They're a unique resource but
9 absolutely did not.

10 MS. HELLMAN: Thank you, I have no further
11 questions.

12 THE COURT: Mr. Cost.

13 MR. COST: Nothing further, Your Honor.

14 THE COURT: Thank you very much, Mr. G [REDACTED].

15 THE WITNESS: My pleasure. Take care.

16 THE COURT: Let me ask Ms. Clark and Mr. Cost, I
17 have read the affidavits from the patients. This is taking a
18 little bit longer than I think we anticipated. Unless there
19 is anything new from the patient.

20 Let me just ask Ms. Hellman, does Express Scripts
21 admit or stipulate that they've done nothing to notify
22 patients regarding the termination of Linden Care?

23 MS. HELLMAN: We don't. And Ms. Roberts is going
24 to testify to that exactly what steps have been taken.

25 MR. COST: Your Honor, again, I would call these

R [REDACTED] G [REDACTED] - Cross - Ms. Hellman

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1 other witnesses who I think would give that testimony. I
2 believe some of them have submitted affidavits and
3 statements. Again, Your Honor, I'm happy to elicit that
4 testimony. But it's going to be the same thing each time, so
5 unless the Court desires to hear that same testimony four
6 more times, we would rest on our submissions.

7 THE COURT: Thank you, Mr. Cost. Any further
8 evidence or testimony for Linden Care?

9 MS. CLARK: Yes, Your Honor. I did name Bonnie
10 Roberts as a witness for Linden Care and so I'm going to call
11 her at this time.

12 THE COURT: Ms. Roberts, could you come up and my
13 courtroom deputy will place you under oath.

14 THE CLERK: Please state and spell your full name
15 for the record.

16 THE WITNESS: Bonnie Roberts.

17 **BONNIE ROBERTS**, called as a witness and being
18 duly sworn, testifies as follows:

19 *DIRECT EXAMINATION BY MS. CLARK:*

20 Q Good afternoon, Ms. Roberts.

21 A Good afternoon.

22 Q Ms. Roberts, can you please tell us what your current
23 position is at Express Scripts?

24 A Yes, I'm the director of provider credentialing.

25 Q And is there a particular network that you oversee in

1 that capacity?

2 A It's primarily the retail provider network.

3 Q Express Scripts has a number of different networks, is
4 that right?

5 A Yes, there are a number of different networks.

6 Q Can you just give us an overview of the different
7 networks?

8 A Sure. There are custom networks for specific clients.
9 There are general networks are going to contain 65,000 or so
10 retail pharmacies, and those may be chain drugstores, they
11 may be grocery stores, independent pharmacies as well. It's
12 going to -- we have long term care networks, we have home
13 infusion networks, we have specific specialty Medicare
14 networks as well.

15 Q Are there any general specialty networks?

16 A General specialty?

17 Q Right.

18 A No.

19 Q And Express Scripts is a large corporation, correct?

20 A Yes, we are.

21 Q I think it's about the 20th biggest corporation in the
22 country, is that about right?

23 A Yes.

24 Q Multi-billion dollar entity, right?

25 A Yes, that's correct.

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1 Q How many employees?

2 A Approximately 30,000 employees.

3 Q Including quite a hub here in Troy, New York, correct?

4 A Yes, that's correct.

5 Q And how many clients does Express Scripts serve?

6 A I don't have the exact number. There are thousands of
7 clients that we service, though.

8 Q And the clients are HMOs and payers of all sorts, is
9 that fair to say?

10 A That is correct, payers of all sorts. The managed
11 health care organizations, health plans, independent
12 businesses, as well as government entities such as the
13 Department of Defense.

14 Q And is it Express Scripts' role to serve those clients
15 by assembling a network of pharmacies to serve their members?

16 A That is one of the benefits that we bring to our
17 clients, yes.

18 Q And does Express Scripts function in all states?

19 A Yes. Could I ask a question?

20 Q Sure.

21 A When you say function in all states, could you clarify?

22 Q Operate.

23 A Do we operate in all states? Yes, I believe so.

24 Q And does every state have its own set of laws that apply
25 to managed care networks?

1 A I can't answer that question. I don't know.

2 Q You're just the wrong person?

3 A I'm the wrong person.

4 Q Who would be at Express Scripts that could come tell us
5 under oath what the network of state laws are that govern the
6 provision of Express Scripts services as part of a managed
7 care network?

8 A I'm not sure. I'm sure that there is someone in our
9 legal department or compliance department that could talk to
10 you about that, but I'm not the right person.

11 Q So you have a compliance department and that compliance
12 department would deal with state regulatory and compliance
13 issues, is that fair to say?

14 A That sounds right.

15 Q Generally speaking, am I right that Express Scripts
16 deals with clients that have their own formularies?

17 A Some clients have their own formularies, we would call
18 them custom formularies. We also have the national preferred
19 formulary that we introduce to clients.

20 Q How do clients decide what their formulary is going to
21 be?

22 A They make those decisions, and I'm sure they make them
23 in a variety of different ways based on who their
24 beneficiaries are. I couldn't tell you how those clients
25 make those decisions.

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1 THE COURT: Could you describe what a formulary is?

2 THE WITNESS: Sure. A formulary is a list of
3 preferred prescription medications that either a client or
4 somebody like Express Scripts benefit manager has documented.

5 THE COURT: Thank you.

6 Q A menu basically of the drugs that are covered by the
7 plan?

8 A That's correct.

9 Q And so the members of the plan pay a premium of some
10 kind typically, unless it's Medicaid or Medicare, right?

11 A Typically, yes.

12 Q In exchange they bargain for, among other things,
13 prescription drugs that are on that menu or formulary, right?

14 A In its simplest form, yes.

15 Q And then it's up to Express Scripts to find a way to get
16 the patients the drugs that are on the formulary, right?

17 A I'm not sure I understand your question.

18 Q Well, is it Express Scripts' responsibility to make
19 arrangements with the creation of a pharmacy network so that
20 patients have access to the drugs that they're entitled to on
21 the formulary that applies to their plan?

22 A Yes. Express Scripts puts together a network of
23 pharmacies that patients can use. Patients can choose to,
24 they can choose preferred or non-preferred items, that is up
25 to them. They may pay a little bit more for a non-preferred

1 item. It is really a patient choice.

2 Q And what is prior authorization?

3 A Again I'm not the right person to speak to you about
4 prior authorization. I've worked at the company long enough
5 that I know a little bit. And, in general, a prior
6 authorization is going to be permission to use a
7 non-formulary item.

8 Q And how does one go about getting prior authorization?

9 A Again, that's not my department.

10 Q Well, you're aware that there is some kind of
11 administrative process that needs to be accomplished,
12 correct?

13 A Yes.

14 Q And it involves communication with the doctor, sometimes
15 communication with the pharmacy to figure out if that patient
16 is appropriate and eligible for the drug in question that the
17 doctor wants the patient to have, right?

18 A You've described it as generally as I can.

19 Q Okay. How does Express Scripts get paid?

20 A I'm not in the finance department and I can't speak to
21 you how Express Scripts gets paid.

22 Q How many years have you been at Express Scripts?

23 A Twenty years.

24 Q Have you held any other positions besides director of
25 credentialing?

1 A Yes, I have.

2 Q And what are those other positions?

3 A I was the -- well, for about 11 years I worked at a
4 department that managed and administered patient assistance
5 programs for pharmaceutical manufacturers.

6 Q And what company was that?

7 A It was with Express Scripts, subsidiary of Express
8 Scripts.

9 Q What's a patient assistance program?

10 A Those are programs that manufacturers of pharmaceuticals
11 generally have in place for the uninsured population.

12 Q It's basically a program that helps patients, assists
13 patients in getting their medications, is that right?

14 A It is a program that would -- that a particular
15 manufacturer would have, and the subsidiary I worked for as
16 part of Express Scripts managed those programs. For example,
17 Pfizer, if they had a list of medications that they felt were
18 appropriate that they wanted to offer for free to uninsured
19 members, uninsured patients, then the programs I worked for
20 would administer the program. We would have call centers
21 and, you know, applications that patients would have to fill
22 out to show that they were eligible would come through us.

23 Q Have you had any other positions with Express Scripts?

24 A When I first started I was a nurse liaison in the home
25 infusion area.

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1 Q So do you have nursing background?

2 A I do.

3 Q And what is your degree?

4 A I just have a -- I'm a registered nurse.

5 Q And in what state were you?

6 A I was registered in Texas, Massachusetts and in
7 Missouri.

8 Q So are you telling us that you don't have any
9 information about how Express Scripts gets paid by its
10 clients?

11 A I'm telling you that I don't work in the finance
12 department of Express Scripts and I would not be able to tell
13 you with any type of accuracy how that payment system works.

14 Q You're aware that there is a number of different
15 compensation arrangements, right?

16 A Yes.

17 Q And you're aware that one of the compensation
18 arrangements involves Express Scripts benefiting in some way,
19 whether it's a percentage or something else, when they bring
20 in drug costs for the plan at a certain level?

21 A I can tell you that the mission of Express Scripts, what
22 it has always been, is to make prescription drugs safer and
23 more affordable to the members of our clients.

24 Q Well, that's an answer to a different question. Can we
25 please read back?

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1 (Whereupon the record was read back by the court
2 reporter.)

3 A I don't work with directly with the clients. I don't
4 work in the finance department and I'm unable to answer your
5 question.

6 Q So you're not aware that that's a component of Express
7 Scripts compensation arrangement?

8 A No, I am not. It's outside of my scope.

9 Q Are you aware or would you have any basis to disagree
10 with the fact that Express Scripts also benefits from rebate
11 arrangements with manufacturers?

12 A Yes, I believe they do, but I believe many of those
13 benefits are also passed on to clients.

14 Q Many but not all, correct?

15 A I can't answer that question. I don't know.

16 Q Are you aware that Express Scripts has been investigated
17 and has reached settlements with prosecutorial authorities as
18 a result of improper diversion of rebates?

19 A No, I'm not personally aware of that.

20 Q Does Express Scripts benefit financially in any way from
21 sending patients to its own captive pharmacies?

22 A Express Scripts has pharmacies that are subsidiaries of
23 the larger corporation. You've called them a captive
24 pharmacy and I don't know that I would agree with that term.

25 Q They're wholly owned pharmacies, right?

1 A That's my understanding. But again, you know, I have a
2 scope of work that I do within my job and I really don't want
3 to guess at any of the answers that you're looking for.

4 Q Well, certainly you understand that Express Scripts is
5 not only managing the benefits for the members of the plan
6 but that it also has subsidiaries that compete with the
7 pharmacies that it's managing, fair enough?

8 A No, we really don't have any pharmacies that compete
9 with a retail pharmacy.

10 Q Do you have any pharmacies that provide the same drugs
11 that retail pharmacies provide?

12 A We have, yes, we have mail order facilities that would
13 provide the same types of products, yes.

14 Q And these mail order facilities, these are large
15 distribution centers, correct?

16 A Yes, in general.

17 Q I can't walk in there and hand in a prescription, can I?

18 A No.

19 Q And they have robotics and very sophisticated means of
20 packaging and shipping via mail or otherwise drugs, right?

21 A Yes.

22 Q And do those mail order pharmacies compete in the same
23 market as retail pharmacies and other independent pharmacies?

24 MS. HELLMAN: Objection, Your Honor. This has been
25 going on, I mean it's 2:30 today, and we're getting way

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1 outside the scope of their complaint and what we're here on
2 today.

3 MS. CLARK: May I, Your Honor?

4 THE COURT: Yes.

5 MS. CLARK: This is a central issue, conflict of
6 interest that implicate Section 4406-d, the mandatory clause
7 to the Public Health Law and the addenda that are part of the
8 Express Scripts' contract are there to deal with this
9 conflict of interest that I'm establishing, and we have
10 antitrust claims which are highly relevant here.

11 THE COURT: I understand, but I don't think this
12 witness is the proper person with respect to the questions
13 you're asking.

14 MS. CLARK: Okay.

15 THE COURT: Sustained.

16 Q Who's in charge of reviewing information provided by
17 pharmacies to ensure compliance? Would that be you?

18 A What type of compliance are you referring to?

19 Q Let's talk about compliance. Is there a department at
20 Express Scripts that looks at compliance with Express
21 Scripts' requirements and standards?

22 A In order to contract with Express Scripts?

23 Q No. In order to monitor compliance.

24 A That would be the audit department.

25 Q Okay. Does your department have any responsibility for

1 monitoring compliance with Express Scripts standards that
2 apply to pharmacies?

3 A My department reviews the provider certifications that
4 pharmacies submit upon application to become a network
5 pharmacy within Express Scripts, and we also review
6 credentialing on an ongoing basis of pharmacies to ensure
7 that they are appropriately licensed and have not been
8 federally or state excluded.

9 Q And in terms of the credentialing process, do you
10 communicate with the audit department regarding the results
11 of any audits?

12 A On rare occasions.

13 Q So if there is an audit that revealed a problem of some
14 kind, that could be communicated to the credentialing
15 department and they would deal with that through the
16 credentialing process, right?

17 A On occasion the audit department will ask for
18 information that we may have obtained through the
19 credentialing process, such as licensure.

20 Q And does the credentialing department in determining
21 which pharmacies are going to stay in the network and what
22 pharmacies are going to be terminated have access to the
23 information that is developed by the audit department?

24 A We have access to limited information from the audit
25 department.

1 Q So let's say the auditors find fraud during an audit.
2 That's something that would be relevant to the credentialing,
3 correct?

4 A No, that would not be my department. It would go to the
5 fraud, waste and abuse department.

6 Q If they uncovered a practice that did not meet Express
7 Scripts' credentialing standards, that would be communicated
8 to the credentialing department, right?

9 A Yes.

10 Q And you would have files of some kind, right, with that
11 information, if you had any, from the audit department
12 showing some significant departure in terms of compliance
13 with Express Scripts' standards, right?

14 A Yes.

15 Q Is it a written file or an electronic file?

16 A Maybe we could talk about what audit does in general.

17 Q Well, your attorney will have plenty of time to ask you
18 questions. I'm going to ask my questions.

19 So this credentialing file that you developed to look at
20 the credentials of a provider, is this a written file or an
21 electronic file?

22 A We have electronic files.

23 Q What would be in that file besides anything from the
24 audit department that was an indicator of some significant
25 departure from compliance standards?

1 A I'm not aware of any information that is in any of the
2 credentialing files that would have been submitted from the
3 audit department that would speak to significant departures
4 from our contracts. What is in those files is the due
5 diligence that we do, the proof that we checked the OAG, the
6 proof that we checked the GSA, the proof that we checked the
7 state Medicaid license, the proof that we looked at the Board
8 of Pharmacy license for the pharmacy and for the pharmacist
9 in charge for each of the states that the pharmacy may have
10 indicated they hold license. It also includes insurance
11 information and the provider certification that they have
12 signed and sworn to.

13 Q Let's take a specific scenario. If the auditors come in
14 to determine compliance with Express Scripts standards,
15 everything from form of prescriptions to verifying delivery,
16 right, those are the kind of things that Express Scripts
17 requires providers to do and comply with to submit claims,
18 right?

19 A Yes.

20 Q And let's say they find that there is a problem, there's
21 a pharmacy that is shipping into a state on a significant
22 scale without a license. Would the audit department report
23 that to the credentialing department?

24 A No, would probably report it to the fraud, waste and
25 abuse.

1 Q Would they also report it to the credentialing
2 committee, so it could be taken into consideration when the
3 credentialing department looks at the status of the provider
4 and makes a determination of whether or not they want them to
5 stay in their network?

6 A If the situation is found, it would probably be
7 addressed right away by the appropriate departments within
8 Express Scripts.

9 Q Would that kind of information be part of the limited
10 information that the people in your department get to make a
11 decision about whether or not to keep a pharmacy in your
12 network?

13 A No.

14 Q Okay. So you have the auditors out there interpreting
15 the Express Scripts' Provider Manual, guidelines, billing
16 requirements, right, and providing feedback to the pharmacy.
17 But that information is not communicated to the credentialing
18 department, is that what you're saying?

19 A Credentialing is separate and apart from the audit team.

20 Q Right. So they don't communicate?

21 A On a rare occasion we may communicate.

22 Q Would something like shipping out of state be the kind
23 of thing that would be communicated?

24 A I believe I've already answered that question. It would
25 not come to my department.

1 Q What if you had a pharmacy that upon audit that under
2 one view of things was using home delivery in violation of
3 Express Scripts' standards, would that be the type of thing
4 that would be reported to the credentialing department to
5 determine if they wanted them in the network?

6 A The audit department does not usually at whether or not
7 a pharmacy is shipping into another state that I'm aware of.

8 Q Well, the audit department looks at whether or not
9 they're shipping, correct?

10 A I don't know.

11 Q Do you know one way? You were in the courtroom earlier,
12 right, when the witnesses were talking about the Express
13 Scripts audits and everything they looked at. Do you have
14 any reason to disagree with the testimony earlier that
15 Express Scripts audits regularly the delivery documentation
16 of a pharmacy to verify that the person got the drugs? Are
17 you disagreeing with that?

18 A No, I am not disagreeing with what Express Scripts does,
19 the audit department does check to ensure that the patients
20 have received the medications that are shown on the claim.

21 Q Right. And the auditors are responsible for
22 interpreting and applying all of the standards that are
23 incorporated into the Express Scripts Provider Manual,
24 correct? Those are the standards they use for auditing,
25 right?

1 A I don't know what the standards are that the auditors
2 use.

3 Q Well, certainly if the credentialing department is using
4 the same Provider Manual as the auditing department, they
5 should be applying the same interpretation of standards,
6 right? We shouldn't have the credentialing department having
7 a different interpretation of a term than the auditing
8 department, right?

9 A Ms. Clark, I'm not in the audit department so I can't
10 speak to their policies and procedures.

11 Q Right. But you would agree with me that you would want
12 those two departments using the same interpretation of
13 standards, right? You wouldn't want a different standard
14 used for credentialing than the standard that was used for
15 auditing, right?

16 A They're really two different things in my opinion.

17 Q So it would be okay with you if the auditing department
18 was interpreting, for example, the term mail order pharmacy
19 differently than the credentialing department? That would be
20 acceptable from your perspective?

21 A Again, I don't know policies and procedures of the audit
22 department. I'm not sure what their checklist of things
23 looks like that they're looking for and how they're matching
24 that with the contracts that are held with each individual
25 pharmacy, so I can't speak to your question.

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1 THE COURT: Counsel, let's move on to what this
2 witness does within the scope of her job.

3 MS. CLARK: Okay.

4 Q What investigation did Express Scripts do before they
5 decided to terminate without notice Linden Care from its
6 network?

7 A I'm not an investigator.

8 Q Well, you're responsible for the credentialing, right?

9 A Yes.

10 Q And you were responsible for, in part for making this
11 decision to kick Linden Care out of the network with no
12 notice to Linden Care, right?

13 A Yes. I was part of the discussions.

14 Q Part of discussions. Who was involved in those
15 discussions?

16 A There were a number of people involved in the
17 discussions, a number of departments. Our fraud, waste and
18 abuse team was involved in looking at the claims data. We
19 had our retail contracting team look at the contract that is
20 held with Linden Care. My team pulled the credentialing
21 documents to look at information we had directly from Linden
22 Care.

23 Q And you say claims data. Are we talking about data that
24 would indicate Linden Care's prescription dispensing habits?

25 A Yes.

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1 Q And when we're talking about claims data, are we talking
2 about claims data that might indicate how much business that
3 Linden Care was doing with a particular manufacturer?

4 A Well, when we would see the types of medications that
5 were dispensed and it could easily be tied back to which
6 manufacturers those products come from.

7 Q Right. So you can look at what's being prescribed and
8 who the manufacturer is, right?

9 A Yes.

10 Q And one of the significant concerns with respect to
11 Linden Care in review of the claims data was that Linden Care
12 was doing a lot of business with a manufacturer named
13 Horizon. That was a significant concern, wasn't it?

14 A Yes. It came to our attention, yes.

15 Q Is there anything in the Provider Manual that
16 specifically would tell a pharmacy that there is only a
17 certain amount percentage of business that they can have with
18 a particular manufacturer?

19 A I'm not that familiar with the Provider Manual to be
20 able to speak to every aspect of it.

21 Q You don't know of any, do you?

22 A I do not know of any, but there are many things in the
23 Provider Manual that I am not familiar with.

24 Q Let's talk about what you do know and we'll move on from
25 there. So this was a concern that Linden Care was doing a

1 lot of business with Horizon, right, and that played a part
2 in determining whether or not they were going to be
3 terminated from the network, correct?

4 A The termination notice that we issued to Linden Care was
5 based on the fact that we learned they were shipping into a
6 state that they were unlicensed in and that they were
7 primarily acting as a mail order pharmacy and not a retail
8 pharmacy, under which they were contracted as a retail
9 pharmacy.

10 Q Well, we have the termination letter and we know what
11 was in there. I think you acknowledged that a separate
12 concern was the fact that Linden Care was doing too much
13 business with Horizon. Is that correct or not?

14 A It was information that we found as we looked further
15 into the data.

16 Q Why were you concerned about that?

17 A It gives us pause. I mean we read an article in the New
18 York Times in October that specifically mentioned Linden Care
19 and potential relationship with Horizon Pharma.

20 Q And what relationship were you concerned about? Did you
21 have information that Horizon owned any part of Linden Care?

22 A No, not that I'm aware of.

23 Q And we know that Express Scripts owns its pharmacies,
24 right?

25 A Yes.

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1 Q There is no information that Horizon had any interest at
2 all in Linden Care, correct?

3 A Not that I'm aware of.

4 Q And is there any standard anywhere in the Provider
5 Manual or in the Provider Agreement that limits the amount of
6 business that a pharmacy can do with a particular
7 manufacturer before it is termed a captive?

8 A The term captive is new to me and so I don't think that
9 there is anything in the Provider Manual that speaks to a
10 captive pharmacy. But again, I'll go back to there are many
11 things in the Provider Manual that I'm not familiar with.

12 THE COURT: Ms. Roberts, you said there was a
13 concern about Linden Care and Horizon based upon the New York
14 Times article. What was that concern?

15 THE WITNESS: We wanted to make sure that there
16 wasn't an ownership relationship with Horizon Pharma and
17 Linden Care Pharmacy because that would be inappropriate.

18 Q And how did you go about finding out or investigating
19 whether or not there was a relationship, an ownership
20 relationship?

21 A That wasn't something I participated in.

22 Q Did you participate in those discussions?

23 A No.

24 Q Do you know what the outcome was of those discussions?

25 A My understanding is that there was not an ownership

1 relationship found.

2 Q Okay. Are you familiar with the statements that Express
3 Scripts has made in its releases to the media regarding the
4 fact that Linden Care was terminated because, quote, "It
5 predominantly dispensed Horizon prescription drugs and did
6 not fulfill key components of the pharmacy network
7 agreements"?

8 A I'm familiar with what is stated.

9 Q And is there anything in the Provider Agreement or in
10 the manual that you know of, and I know you don't know every
11 word of that 200 plus page single-spaced document any more
12 than anyone could, but is there anything in that manual that
13 says that pharmacies that predominantly dispense a given
14 manufacturer's drugs are committing some kind of improper
15 practice?

16 A Well, if the products are formulary items and, you know,
17 the pharmacy is using its best practices to adhere to the
18 formulary of a patient, then I don't think that there is
19 anything wrong with that. But we have found that those best
20 practices may have been used in trying to adhere to patient
21 formulary.

22 Q Now you're saying that there was some departure from
23 formulary standards that caused Linden Care at least in part
24 to be terminated, is that right?

25 A No. What I'm saying is that would be one of the

1 concerns.

2 Q And did anybody investigate that concern as it related
3 to Linden Care?

4 A I don't know.

5 Q Did the termination letter to Linden Care include the
6 concern that Express Scripts put in its press releases that
7 Linden Care was terminated because it predominantly dispensed
8 Horizon prescription drugs, was that in the termination
9 letter?

10 A No, it was not. It was additional information I believe
11 that was learned after the termination letter was issued.

12 Q And more specifically, is there anything in the Provider
13 Agreement or the Provider Manual saying that a provider can't
14 predominantly dispense a given manufacturer's drug?

15 A Not that I'm aware of.

16 Q That doesn't exist, does it?

17 A Not that I'm aware of.

18 Q Did Express Scripts reach out in any way to Linden Care
19 to get information about its relationship with Horizon and
20 their conclusion that Linden Care was functioning as a,
21 quote, "captive pharmacy"?

22 A I don't know if there were discussions held. I don't
23 know if anyone reached out to Linden Care to speak to them.
24 I'm not aware of anyone speaking to Linden Care personnel.

25 Q You have no reason to believe that there was any

1 communication with Linden Care at all on that issue that
2 became a subject of the press releases issued by Express
3 Scripts, correct?

4 A I'm not aware of the communication. I'm aware of the
5 data that we saw, you know, in the number and the percentage
6 of patient prescriptions that were filled that were for a
7 single manufacturer.

8 Q And in the Provider Agreement there is actual a process
9 that is identified for resolving issues of concern, correct?
10 They can be raised with the provider and even notice can be
11 given to the provider of the concern, the provider comes back
12 provides information and has an opportunity to cure the
13 issue, correct?

14 A Those do exist, yes.

15 Q And those are right in the Provider Agreement, and
16 that's a process that's ongoing between Express Scripts and
17 the members of their pharmacy networks, correct?

18 A Could you repeat the question?

19 Q That notice and opportunity to address and cure is a
20 common occurrence between Express Scripts and its pharmacies,
21 correct?

22 A I believe it depends on the severity of the findings.

23 Q Okay. Had there been other pharmacies where there has
24 been a concern about, for example, out of state shipping
25 where there has been an attempt to communicate with the

1 pharmacy regarding the circumstances of those findings before
2 they were terminated?

3 A I don't know. I'm in one department.

4 Q And so isn't it true that under the Provider Agreement
5 most issues are subject to the provision, most issues of
6 concern that can come up in your department can be resolved
7 through this provision of the Provider Agreement where the
8 provider gets notice of the problem and an opportunity to
9 cure. Can you tell me the kinds of things that are resolved
10 that way?

11 A We might issue a cease and desist order if we find that
12 a pharmacy is taking an action that they are not supposed to.
13 If they fail to comply with that then they would be
14 immediately terminated.

15 Q And in this case did Linden Care get a cease and desist
16 order with respect to the Maryland issue?

17 A I don't think there was a Maryland issue that we
18 discovered.

19 Q Okay, let me step back a little bit. I'm probably
20 getting a little ahead of myself here. One of the issues in
21 the termination agreement was that there was a -- there was
22 no license in Maryland for Linden Care?

23 A Correct.

24 Q And was there any opportunity to respond or cure
25 provided to Linden Care for that item?

1 A No. What we found was that Linden Care did not have a
2 license in California, that they had -- they were breaking
3 the law in California and we felt that severe enough to take
4 action.

5 Q That's really not my question. One of the items in the
6 termination letter said that Linden Care doesn't have a
7 license in Maryland and that's one of the reasons it's being
8 terminated, am I right?

9 A Yes, you're right.

10 Q As it turned out, Express Scripts was wrong about that,
11 weren't they?

12 A Yes, we were wrong.

13 Q There is item number one. Item number two, the
14 California shipments, did Express Scripts reach out in any
15 way to Linden Care to communicate with them regarding why and
16 how those prescriptions went to California?

17 A Not that I'm aware of.

18 Q Are you aware that Linden Care has a sister pharmacy in
19 California?

20 A Yes.

21 Q Was there any effort to determine whether or not there
22 might have been an error made in Express Scripts' records
23 regarding those shipments that Express Scripts thinks were to
24 California residents from a New York pharmacy?

25 A I'm not aware of any communication.

1 Q They just terminated, right?

2 A Yes.

3 Q Okay. And the third issue was the mail order issue,
4 right?

5 A Yes.

6 Q And in Linden Care's case they had a retail pharmacy
7 contract, right?

8 A Correct.

9 Q Can you tell me how it came about that Linden Care
10 received a retail pharmacy contract?

11 A That is the contract they applied for.

12 Q Were you involved in that process?

13 A No, not in 2009.

14 Q So you can't tell us in any way what Linden Care's
15 discussions might have been with Express Scripts about which
16 of all of these pharmacy networks you've talked about they
17 might best fit into? You can't tell us anything about that,
18 can you?

19 A I can tell you what they submitted on their provider
20 application in 2009.

21 Q Yes. That is not my question. My question is, you
22 can't tell us what the interaction was between Express
23 Scripts and Linden Care at the time that they were provided
24 with and supplied an application for the retail network, can
25 you?

1 MS. HELLMAN: Objection, Your Honor.

2 Q No information about that?

3 A In 2009, no.

4 THE COURT: Overruled.

5 MS. HELLMAN: Thank you.

6 Q And in the provider -- in the Provider Manual, is there
7 any prohibition against using home delivery as a means of
8 getting prescriptions to patients?

9 A In the Provider Manual?

10 Q Right.

11 A There is not that I can think of in the Provider Manual,
12 but there is in the Provider Agreement.

13 Q And does it say in the Provider Agreement that a retail
14 network pharmacy can never send by overnight mail or other
15 means a prescription for home delivery? Doesn't say that,
16 does it?

17 A It does not say that. What it does --

18 Q Thank you. Really what we're talking about is that in
19 the Provider Agreement there is a definition of retail
20 pharmacy, correct? That's what you're talking about?

21 A Yes, there is a definition.

22 Q Right. But however, beyond that definition there is no
23 prohibition regarding the means -- or direction regarding the
24 means of delivery to a patient, right?

25 A Not that I'm aware of.

1 Q And am I right that many retail pharmacies in the
2 Express Scripts network use routinely overnight delivery or
3 courier and other means to get their prescriptions to their
4 patients?

5 A I'm sure that they do, yes.

6 Q Is there anywhere in the agreement that sets, for
7 example, a threshold percentage of the amount of home
8 delivery that a provider can use and still be in the retail
9 network?

10 A There is not a percentage indicated.

11 Q Do you know what that percentage is? Did your
12 department have one in mind? Is it 50 percent, 40 percent,
13 60 percent, or is it more you know it when you see it?

14 A My department upon with pharmacies applying to be in our
15 network, if a pharmacy indicates that they are 10 percent or
16 more mail order, they would not qualify to be a retail
17 pharmacy or qualify for a retail contract.

18 Q Well, in the Linden Care credentialing document that
19 Express Scripts provided, which is an exhibit, there was a
20 disclosure of 39 percent mail order. You're aware of that,
21 right?

22 A It was in a re-credentialing document yes.

23 Q Yet they were re-credentialed and approved for the
24 retail network, right?

25 A They were 39 percent local and out of state.

1 Q And that's almost 400 times more than the 10 percent
2 threshold that your department has unpublished internally as
3 a guideline, is that right?

4 A It is more, yes.

5 Q When you were re-credentialing them a few years ago when
6 they were at 39 percent, did anybody reach out to Linden Care
7 and communicate to them that Express Scripts had this
8 internal guideline regarding the amount of overnight delivery
9 that would be tolerated with a retail network pharmacy?

10 A Not that I'm aware of.

11 Q Is that threshold published anywhere on the Express
12 Scripts' website in the provider area where there is guidance
13 to providers?

14 A It is not published.

15 Q And in large metropolitan areas like downstate New York,
16 there are a lot of retail pharmacies that predominantly use
17 delivery services to get their drugs to their patients,
18 aren't there?

19 A Well, I consider delivery services very different than
20 mail order.

21 Q Well, Linden Care didn't use U.S. mail, did it?

22 A I don't know.

23 Q Well, as part of your investigation before you
24 terminated Linden Care with no notice, was there any effort
25 made to determine how Linden Care was delivering?

1 A I personally did not have any investigation into how
2 they were delivering.

3 Q So you don't have that information and you didn't know
4 it when you made the determination to terminate Linden Care,
5 did you?

6 A I'm not sure that there is a distinction between using
7 the mail and using U.S. Postal Service and using other
8 delivery services if you're shipping outside of the state.

9 Q So in your mind it's the shipping outside of the state
10 that's the important factor in this determination of whether
11 or not someone's properly using home delivery in a retail
12 network?

13 A That's a significant part of it, yes.

14 Q And where is that published? Is that in the Provider
15 Manual?

16 A It is not in the Provider Manual.

17 Q Is it on the website anywhere?

18 A It's in the definition of a retail provider that is in
19 the Provider Agreement.

20 Q Now Express Scripts doesn't have a problem with mail
21 order, right? I mean, Express Scripts does a tremendous
22 business through its mail order pharmacies, right?

23 A That's exactly right, yes. We have different standards
24 for mail order pharmacies versus retail pharmacies.

25 Q So it's not that -- it's not that Express Scripts

1 doesn't want drugs, quote, unquote, "mail ordered," it's that
2 Express Scripts wants to be the entity that does the mail
3 ordering, right?

4 A No. We want to make sure that we have pharmacies that
5 are appropriately contracted in our network. If a pharmacy
6 is going to act as a mail order pharmacy, they can apply to
7 Express Scripts to be a mail order pharmacy.

8 Q Well, wouldn't it make sense to tell the provider if
9 they disclosed to you that they have 40 percent home
10 delivery, wouldn't it make sense when your auditors come in
11 and receive the files of FedEx delivery documentation clearly
12 disclosing that they're using home delivery, to give them
13 that information about these internal standards and
14 thresholds so they can decide if they want to apply to the
15 mail order network?

16 A If an auditor was looking at the information or the data
17 of the dispensing patterns of the pharmacy in the aggregate,
18 yes, that makes sense. But an auditor usually has a select
19 list of claims that they're looking at and they are not
20 looking at the data in the aggregate.

21 Q So are you saying that auditors do not -- are not
22 familiar with the standard that you've articulated for the
23 threshold of home delivery that is tolerated by Express
24 Scripts in the retail network?

25 A I'm saying that auditors audit one claim at a time.

1 They don't look at the aggregate data of, you know, the
2 dispensing patterns of a pharmacy, so an auditor if on site
3 at Linden Care or looking at claims coming through the
4 system, they're looking at one claim at a time and they do
5 not audit 100 percent of the claims. They have algorithms
6 that they use to identify if a claim might look odd, if there
7 is -- it looks like there is an extra zero on the end of it.
8 Those are the types of things that the audit department does,
9 as I understand it.

10 Q Does the audit department look at whether or not
11 someone's violating a requirement of the Provider Agreement
12 or the Provider Manual with respect to improper delivery
13 methods?

14 A The audit department looks at -- they are auditing
15 claims for appropriateness of the claim and they are not
16 auditing against the contract.

17 Q So auditors, for example, wouldn't pick up if someone
18 was shipping out of state?

19 A Again, they may see a claim that is out of state. They
20 are not looking at the aggregate information.

21 MS. HELLMAN: Your Honor, I'm sorry to interrupt, I
22 just looked at the time, it's 3:00. I just want some sense,
23 it's been five hours, we haven't started our case. I know
24 there was some questions that the Court wanted to address, so
25 just a sense of when we stop today. I'm just getting -- I

1 want to have a chance to be able to put on our case as well.

2 THE COURT: Let me just say that the Court has to
3 end today at 5:00. I'm happy to continue this into Monday
4 morning, but I did have a number of questions and I think we
5 need to give the court reporter a break. So let me ask how
6 much more time do you need, Ms. Clark, and how much time do
7 you anticipate that you need, Ms. Hellman?

8 MS. CLARK: I have about a half an hour, give or
9 take, but it depends on how it goes.

10 MS. HELLMAN: And probably at least an hour, at
11 least an hour and a half, yeah, I would say. That just given
12 I think some that has some out, so I think there is a couple
13 of issues that we have to address. Ms. Clark took 35 minutes
14 for an opening statement. I don't need that long. I would
15 like five minutes before we start our case to have a chance
16 to talk on a few points, and certainly we are prepared to
17 address the four questions that you sent yesterday.

18 THE COURT: With that it seems to me we'll need to
19 continue into Monday. I think there is -- I anticipated some
20 time for argument. The Court has a number of questions about
21 the briefing and questions about the case, so I anticipate
22 then we would end today at five and continue Monday morning,
23 unless the parties have another proposal.

24 MS. CLARK: Your Honor, may I confer with my
25 clients briefly?

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1 THE COURT: Yes. Why don't we take a short break,
2 five minutes perhaps.

3 (Recess at 3:10.)

4 (Reconvene at 3:20.)

5 THE COURT: Counsel, with respect to scheduling,
6 have you had an opportunity to speak to your clients?

7 MS. CLARK: I have, Your Honor. We've just taken a
8 look at where we are, and we agree that it's not realistic we
9 think to conclude today, and my client would rather have us
10 go over to Monday than risk the Court not having a full
11 record.

12 THE COURT: Thank you, Counsel.

13 MS. HELLMAN: And Your Honor, just a couple from
14 our end. We agree that I think it's going to be very
15 difficult to finish today. Ms. Roberts is on vacation next
16 week, so if we can push to get through. And I will tell you
17 that the last flight out is 5:30, so we're kind of dealing
18 with a couple different things.

19 The other thing that I would request is that,
20 frankly, we're very surprised that Linden Care did not call
21 Mr. Weiner, even though he has given all the declarations in
22 this case, and we intend to call him in our case as long as
23 he is going to be here on Monday.

24 MS. CLARK: He is not intending to be here on
25 Monday. I was actually thinking I would be here probably on

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1 my own. Everybody is here. He wasn't on the list. We
2 provided plenty of witnesses today that could have been asked
3 any question. These are all officers of the corporation. We
4 would not be inclined to do that.

5 THE COURT: Could he testify by telephone on Monday
6 perhaps?

7 MS. CLARK: Well, Your Honor, I'm a little
8 hamstrung. I have a witness that doesn't know anything about
9 compensation, conflicts of interest and some of the key
10 pieces of my case. If we're going to have me at this point
11 bring witnesses here, then I would like ESI to give me a
12 suitable witness who can speak to the antitrust issues that
13 are at the heart of this and the conflict of interest issues.
14 I would be satisfied with that.

15 THE COURT: Ms. Hellman.

16 MS. HELLMAN: Your Honor, we're here today on a
17 motion for to talk about the merits of the case and
18 irreparable harm. We have brought the witness to talk about
19 why this pharmacy was terminated. They wanted to talk about
20 for lots of hours lots of other issues, but that's what we're
21 here on, in addition to the motions we haven't gotten to yet.
22 Mr. Weiner gave a declaration. He was on their exhibit list.
23 He was on their witness list. We cross identified him. When
24 I heard they had one witness left, that's who I thought that
25 witness was going to be, was the person who has given

1 declaration after declaration in this case.

2 So we do want a chance to talk to him. I mean, we
3 didn't bring witnesses that are dealing with conflicts of
4 interest when I look at their complaint and I don't see where
5 that is relevant at all where we are today. Perhaps when we
6 get to maybe the merits of the case and where it should be in
7 arbitration, but we are here on a motion for a TRO and a PI.
8 So I do want the opportunity to ask Mr. Weiner.

9 THE COURT: Since Ms. Roberts has a plane that
10 leaves at 5:30, so why don't we get Ms. Roberts on the stand
11 and finish her testimony so she can get to the airport and
12 then we can discuss this further.

13 MS. CLARK: Thank you, Your Honor.

14 THE COURT: Ms. Clark, you may proceed.

15 MS. CLARK: May I approach, Your Honor?

16 THE COURT: Yes.

17 BY MS. CLARK:

18 Q This is already in the docket so I'm not going to -- is
19 this the Provider Agreement that you've been referring to?
20 It's redacted at the request of Express Scripts, but is that
21 the Provider Agreement we're talking about?

22 A Yes, it appears to be the definitions.

23 Q And we left off on, perhaps you misspoke, you mentioned
24 that there is a provision in there that prohibits out of
25 state filling of prescriptions. Can you show me where that

1 is?

2 A If I said that, that was not what I meant to say.

3 Q So there's no such prohibition as far as you know
4 anywhere else, right?

5 A Not that I'm aware, no.

6 Q So looking at the definition of retail pharmacy, do you
7 see that?

8 A I do.

9 Q That's the definition that you've been referring to,
10 right?

11 A Yes.

12 Q And that's the provision that Express Scripts thinks
13 Linden Care violated in such a way that it justified an
14 immediate termination without notice or an opportunity to be
15 heard, right?

16 A Yes.

17 Q So let's take a look at that definition. And it says,
18 "A retail pharmacy is defined as a pharmacy that primarily
19 fills and sells prescriptions via a retail store front
20 location." Do you see that?

21 A Yes.

22 Q And Linden Care has a retail store front location,
23 right, you're aware of that?

24 A That's what I've heard today, yes.

25 Q And all the prescriptions that Linden Care fills are

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1 filled at that retail store front location, correct?

2 A They're not dispensed at that store front.

3 Q Do you have information?

4 A I'm sorry, they're not -- they're not dispensed to the
5 patient at that retail location.

6 Q Right. And we already discussed that especially in
7 downstate New York many, many prescriptions are not delivered
8 within the store, correct? There is all kinds of delivery
9 services, right?

10 A Yes.

11 Q Courier, overnight, there's a lot of different ways to
12 get patients their prescriptions?

13 A Yes.

14 Q This doesn't mean when it says a pharmacy that fills and
15 sells prescriptions via retail store front location, it
16 doesn't say there that the drug has to be handed over
17 personally to the patient, does it?

18 A No, it does not.

19 Q And it talks about such other criteria established by
20 Express Scripts from time to time, do you see that?

21 A Yes.

22 Q Where is that criteria, that other criteria? Is there
23 any?

24 A I'm not sure what you mean. Other criteria regarding?

25 Q Regarding what Express Scripts thinks a retail pharmacy

1 is. Is there any other criteria that you're aware of or is
2 this it?

3 A This is the definition of it, of a retail pharmacy.

4 Q Is there any other -- this refers to other criteria to
5 be established by Express Scripts. Do you know of any other
6 written criteria?

7 A Within the Provider Agreement, no.

8 Q How about outside the Provider Agreement, that you know?

9 A I'm not sure.

10 Q Okay. But you can't tell me of any as you sit here
11 today, right? You don't know of any?

12 A Not completely familiar with the full manual.

13 Q Well, certainly when you're making a decision about a
14 sudden termination of Linden Care, which takes care of a
15 hundred thousand patients across the country, you would have
16 looked at all the provisions of the Provider Agreement and
17 the Provider Manual that bear upon whether or not Linden Care
18 was a retail pharmacy or not, right? You would have looked
19 at all of them, right?

20 A Yes. And we determined that 70 percent of their
21 prescriptions were going out of state.

22 Q So you did look at all of them, right?

23 A Yes.

24 Q All. And you can't tell us today that there is any
25 other written criteria other than this definition. I just

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1 want to be sure that when you terminated Linden Care, there
2 is not some other written criteria or an internal memo or
3 something else in writing that you relied upon in addition to
4 this definition. Is there any other document that you relied
5 upon besides this definition? Yes or no?

6 A I'm not an attorney and I did not sign or create the
7 termination letter, so I'm sorry that I'm, you know,
8 stumbling on your question, but the criteria used to draft
9 the termination letter and the person who signed the
10 termination letter, that's not me. But so the criteria that
11 you're asking me about, Express Scripts looked at the
12 situation in whole and we found that it was in the best
13 interest of our business and for our clients to immediately
14 terminate the pharmacy.

15 Q But as you sit here today, that's the criteria as you
16 understand it was used for purposes of deciding to terminate
17 Linden Care, right?

18 A The criteria we used was based on the information that
19 Linden Care had given us.

20 Q I'm talking about -- let's be clear. I'm talking about
21 what Express Scripts' standard was for determining if a
22 pharmacy is a retail provider or not. Is there any other
23 document that you know of, or standard, or criteria that was
24 relied upon by Express Scripts to determine that Linden Care
25 was not a retail pharmacy? Are there any other documents

1 that. Were relied upon?

2 A Not that I'm aware of.

3 Q Okay. Thank you. Now you mentioned earlier that the
4 mission of Express Scripts is to make prescription drugs
5 safer and more affordable for clients. Did I get that right?

6 A Yes.

7 Q Let's talk about the safer part of the equation for a
8 moment. Before Express Scripts terminated -- withdrawn.

9 First of all, when did Express Scripts make the decision
10 to terminate Linden Care?

11 A The date of the letter, is that November 7th, I believe.

12 Q And was that a committee that met or how did that
13 decision get made?

14 A The decision was made by Express Scripts leadership, and
15 I cannot tell you who all was involved in that discussion, I
16 don't know.

17 Q You don't know the people that made that decision?

18 MS. HELLMAN: Objection, Your Honor. She answered
19 this question earlier regarding the different departments
20 that were involved.

21 THE COURT: Overruled.

22 Q Who were the members of the Express Scripts leadership
23 that made the decision last Tuesday to terminate and sent a
24 letter the same day?

25 A I wasn't involved in the -- I was not involved in the

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1 discussions, but I understand that Everett Nevel, who is the
2 vice president and general manager of our supply chain
3 division, brought forward information that we should
4 terminate the pharmacy.

5 Q Did anyone else make that decision?

6 A I don't know.

7 Q Was there a discussion about any sort of communication
8 with Linden Care on these issues?

9 A Not that I was involved in.

10 Q And did, I lost track of the name there, is it Nevel,
11 the last name?

12 A Yes.

13 Q Did Mr. Nevel discuss with you his concern that Linden
14 Care was doing too much business with a particular
15 manufacturer?

16 A I was not involved in the discussions.

17 Q He was the one that told you they were being terminated?

18 A Not me. He did not tell me.

19 Q Did he tell your department?

20 A He told -- yeah. I heard it from my vice president.

21 Q And who is your vice president?

22 A Amber Compton.

23 Q And what did she tell you about the termination as it
24 related to this issue of Linden Care doing too much business
25 with Horizon? Is that something she discussed with you?

1 A It was discussed that there was -- that we were looking
2 into that situation.

3 Q And that was one of the reasons that Linden Care was
4 terminated pursuant to the press release that Express Scripts
5 issued, right?

6 A That's what the press release says, yes.

7 Q And you don't disagree with the press release that
8 Express Scripts put out, do you? You have no reason to
9 disagree with that, right?

10 A No.

11 Q Was there any discussion with your superior or the
12 executive leadership about the impact of an instant
13 termination decided last Tuesday, I think it was the 12th,
14 and implemented last Tuesday and what that decision and its
15 impact would have on patients?

16 A I was not involved in those discussions.

17 Q Do you know if those discussions even happened?

18 A I don't know.

19 Q Did you raise the issue?

20 A I did not.

21 Q Did you say to the executive leadership what's going to
22 happen to the tens of thousands of people who are under the
23 care of this pharmacy in pain management? Did you ask that
24 question?

25 A I did not.

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1 Q Do you know if anybody asked that question?

2 A I don't know.

3 Q Before there was a determination to terminate without
4 notice, did anybody look at your clause to determine if
5 Express Scripts and its clients had any obligations to
6 provide notice?

7 A I don't know. I'm not an attorney.

8 Q I'm not asking that. I'm asking do you know if any part
9 of the team that you communicated with, when they gave you
10 the decision to terminate Linden Care, did they tell you that
11 they had investigated and looked at what New York State law
12 required of them before they terminated a health care
13 provider like Linden Care?

14 A I did not have that discussion.

15 Q Do you know if that discussion occurred?

16 A I don't know.

17 Q Are you personally familiar with New York laws as it
18 relates to provider termination?

19 A I am not.

20 Q When you're involved in the termination of a pharmacy,
21 is that something you would look at, the provider termination
22 requirements of a given state?

23 A I would not look at that. I would depend on my
24 attorneys to look at that.

25 Q Did the attorneys review this?

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1 MS. HELLMAN: Objection, Your Honor.

2 MS. CLARK: I can ask that question.

3 THE COURT: To your knowledge.

4 A To my knowledge, I didn't see them. They didn't tell me
5 they reviewed the laws and I didn't see them review the laws.
6 I would expect them to review the laws.

7 Q But my question is without asking what the lawyers said
8 or any communication, were the lawyers involved in the
9 structuring this termination?

10 A Yes.

11 Q And was there any discussion about the fact that the
12 Provider Agreement refers to New York law and provisions
13 relating to provider termination?

14 MS. HELLMAN: Objection, Your Honor. Ms. Roberts
15 just testified that counsel was involved in this discussion
16 and now she's asking about what was talked about.

17 Q Apart from any discussions with counsel, did anyone from
18 the executive leadership that you talked to have any
19 discussion about whether or not this provider was entitled to
20 notice of termination and an opportunity to be heard in a
21 hearing?

22 A I was not involved in any discussions like that.

23 Q And, in fact, the Express Scripts contract and Provider
24 Manual has a long series of addenda, correct?

25 A Yes.

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1 Q And is that because Express Scripts has to use the
2 addenda to comply with state laws?

3 A Many of the addenda do address state laws, whether it's
4 Medicaid laws or state laws.

5 Q And the addenda are there to ensure that the contracts
6 are in compliance with state law?

7 MS. HELLMAN: Objection. She just talked about she
8 doesn't know what the addenda is. We're now 35 more minutes
9 into this.

10 THE COURT: Sustained. I think it speaks for
11 itself and she's not the interpreter of the addenda.

12 Q But certainly the structure of a termination should
13 honor provider rights that are specifically referenced in the
14 Express Scripts Provider Manual, correct?

15 MS. HELLMAN: Same objection, Your Honor. We're
16 still talking about the addenda.

17 THE COURT: Sustained.

18 Q Does the New York State Department of Health review the
19 Express Scripts Provider Agreement and Manual, to your
20 knowledge?

21 A I don't know.

22 Q Is it Express Scripts' position that it does not have to
23 provide notice of termination and an opportunity to be heard
24 by health care providers like Linden Care?

25 A There are provisions for immediate termination in the

1 Provider Agreement.

2 Q Does Express Scripts take the position that it is not
3 bound by state law with respect to provider terminations?

4 MS. HELLMAN: Same objection, Your Honor.

5 THE COURT: Sustained.

6 Q When Express Scripts terminated Linden Care, did Linden
7 Care immediately write a letter raising the issue of provider
8 termination rights?

9 A I don't know.

10 Q You don't know, okay. Did Express Scripts before it
11 terminated Linden Care formulate any sort of transition or
12 patient notification plan to let the patients know that
13 Linden Care was going to be turned off in the Express Scripts
14 system?

15 A Any time a provider is terminated, we provide notice to
16 members as quickly as possible. I can tell you that as of
17 today 93 percent of the members that were seeking care from
18 Linden Care have been issued a notice. Whether they've
19 received those notices or not, I cannot tell you, but those
20 have gone out.

21 Q So before the termination occurred, there was no notice
22 provided to the patients, right?

23 A That's correct.

24 Q And that was the 12th, and today's the 20th, right?

25 A Today's the 20th.

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1 Q Okay. Was there any plan implemented to make sure that
2 prescribers got notice of Linden Care's termination before
3 the termination occurred?

4 A Generally private notification is not issued that I'm
5 aware of.

6 Q Is there any -- was there any effort to let the clients
7 know, the plans know and give them notice of the termination
8 of Linden Care?

9 A Information was facilitated to the client facing teams
10 immediately.

11 Q And is that done via e-mail or something else, some kind
12 of communication?

13 A It's done through a communication, yes.

14 Q Was there any notice given to the Department of Health?

15 A Not that I'm aware of. I don't know.

16 Q Did you have any concern yourself being the person
17 involved in providing the termination letter to Linden Care
18 that these patients would have a gap in their coverage?

19 A There is always concern for patients when we terminate a
20 pharmacy, and it's not something that we take lightly. But,
21 you know, given the information that we learned regarding
22 Linden Care, there was a gap of trust and, you know, we felt
23 that we needed to act swiftly. There is always a concern
24 about the patients. The patients have an 800 number that
25 they can call 24/7 365 days. They can always call their

1 health plan if they have concerns, they can go to their
2 doctor. So there are many means for patients to provide to
3 discover where they can provide alternate care.

4 Q There's the self help option for patients. My question
5 is, did you give any consideration to what would happen to
6 these patients from the time that Linden Care was turned off
7 last Tuesday morning until eventually they received
8 notification and started making arrangements for a different
9 pharmacy?

10 A Did I make any arrangements for the patients? Did I
11 give any consideration?

12 Q No. Did you consider that?

13 A Yes, it was a consideration.

14 Q And were you aware of the nature of the Linden Care
15 patient population and how sick and vulnerable they are?

16 A I have no knowledge of the individual patients seeking
17 care from Linden Care.

18 Q Did you know it was a pain ridden population?

19 A No.

20 Q Did you do any investigation before there was an
21 immediate termination of Linden Care about who the patients
22 were and how they might be impacted by sudden termination
23 without notice?

24 A That's not part of my scope of my responsibilities.

25 Q Whose responsibility is that?

1 A I don't know.

2 Q Does anybody have that responsibility?

3 A I don't know. I would say that the health plans under
4 which the beneficiaries are covered, that is part of their
5 responsibility.

6 Q The patient's responsibility even if they didn't know
7 that their pharmacy had been terminated?

8 A I didn't say it was the patient's responsibility.

9 Q I might have misheard you. Did patients start calling
10 expressing concern and complaining about the sudden
11 termination of Linden Care?

12 A I was made aware of one escalated issue.

13 Q So to your knowledge there was only one call?

14 A I was made aware of one escalated issue.

15 Q And what was involved in that escalated issue?

16 A A member stated that he wanted to continue to go to
17 Linden Care for his oxycodone.

18 Q And Express Scripts records its calls with patients,
19 right?

20 A I think so.

21 Q Was there any notification that went out to the call
22 center so the call centers would have accurate information
23 about what was going on with Linden Care?

24 A I don't know. Not on the member facing side of the
25 house, I don't know what activities take place there.

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1 Q So you don't know of any such notification, right?

2 A I do not know.

3 Q And you heard testimony here today that patients were
4 calling Express Scripts and the Express Scripts people were
5 telling the patients that it's a problem on Linden Care's
6 end, they're not putting in the right code? Did you hear
7 that testimony?

8 A I heard that testimony.

9 Q Do you have any information suggesting that that didn't
10 occur?

11 A I don't.

12 Q Are you familiar with the statistics on Express Scripts
13 call line for how long patients have to wait?

14 A I don't know those stats, no.

15 Q Did patients send e-mails to Express Scripts expressing
16 concern about the sudden termination of Linden Care?

17 A I'm not aware of any e-mails that were sent.

18 Q And you're aware generally that one of the issues in
19 this case involves antitrust law, correct?

20 A Yes, I've heard that.

21 Q And am I correct that there is this industry association
22 that is comprised of pharmacy benefit managers?

23 A Yes, there is.

24 Q What's the name of that association?

25 A I'm sorry, I don't have the name of that.

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1 Q Could it be PCMA?

2 A It could be, yes.

3 Q And you've been to PCMA events before?

4 A I've never been to a PCMA event.

5 Q Did you go to a webinar at which the pharmacy benefit
6 managers discussed the plan for dealing with specialty
7 pharmacies?

8 MS. HELLMAN: Objection, Your Honor. What is the
9 relevance of this?

10 MS. CLARK: It's directly relevant to the antitrust
11 claim.

12 MS. HELLMAN: I understand how the antitrust claim
13 is and how it is -- I mean, we're talking about reasonable
14 likelihood of success on the merits and we can talk about how
15 they pled their antitrust claims, but we're getting way
16 beyond. There is nothing in any allegations, allegations
17 stated in antitrust about any of this stuff in their
18 complaint.

19 THE COURT: Overruled.

20 Q I'm going to show you a document that's already been --
21 P18. Is this already filed?

22 MR. COST: This is not. I have a copy for the
23 Court as well.

24 MS. CLARK: So we're going to mark this one, if
25 that's okay.

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1 MR. COST: Your Honor, may I approach?

2 THE COURT: Yes. And this is P18?

3 MS. CLARK: P18.

4 Q Do you recognize that document?

5 A Yes, I do.

6 MS. CLARK: One moment, Your Honor, there is
7 technology involved here.

8 MR. COST: The part of the printing got cut off
9 some of the pages, so we have a digital copy we would like to
10 refer to, if it's okay with the Court.

11 THE COURT: Yes.

12 MR. COST: It's the same presentation, but the text
13 is cut off.

14 Q And is this document a publication that is associated
15 with the meeting that you attended?

16 A It was a webinar that I attended, yes.

17 Q And were you attending the webinar on behalf of Express
18 Scripts?

19 A As an employee of Express Scripts, yes.

20 Q It was part of your job right?

21 A Yes.

22 Q And who else was in attendance?

23 A Well, you're asking me about something that was more
24 than a year ago. There were people on the phone and there
25 were a couple of people in the room with me. I can think of

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1 a couple of people in the room, Shawn Davis, John Gavin.

2 Q And were these representatives of Express Scripts or
3 other pharmacy benefit managers?

4 A They were employees of Express Scripts.

5 Q And were there representatives of other pharmacy benefit
6 managers on the phone?

7 A I don't know. It was -- it was a webinar open to many
8 people.

9 Q You see on the front page it says Optum?

10 A Yes.

11 Q What's Optum? That's another pharmacy benefit manager?

12 A Yes.

13 Q This was a webinar that was being offered to employees
14 of pharmacy benefit managers, is that right?

15 A I don't know. It was beyond pharmacy benefit managers,
16 I believe.

17 Q And the topic was controlling the cost of compounded
18 medications, health plan/employer strategies, is that right?

19 A Yes.

20 MS. HELLMAN: I'm going to object. This is about
21 compounded medications.

22 THE COURT: What is the relevance of a webinar on
23 compound medications?

24 MS. CLARK: I'm going to go to the appropriate
25 page.

1 Q And on page 50, there is an indication of a strategy
2 that was going to be used by the group of pharmacy benefit
3 managers to deal with the perceived problem with this group
4 of pharmacies, right?

5 MS. HELLMAN: Objection, Your Honor. She is
6 testifying about a page and talking about a group of
7 pharmacies and pharmacy benefit managers when this witness
8 just said the meeting was open to more people.

9 THE COURT: Overruled.

10 Q Is that right?

11 A Could you repeat it?

12 (Whereupon the record was read back by the court
13 reporter.)

14 A So I would not say that this was a strategy that
15 everybody was going to use. It was -- this webinar was the
16 people listed as the presenters giving their opinions about
17 possible solutions.

18 Q And this is a proposed solution here, correct?

19 A That's what it looks like, yes.

20 Q So the pharmacy benefit managers including Optum and
21 Express Scripts had this webinar which identify a strategy
22 for removing pharmacies from the retail network, do you see
23 that?

24 A I see that.

25 Q And was there also in addition to the presentation in

1 this document, was there also discussion of that issue?

2 A I don't recall.

3 Q After this webinar were, in fact, pharmacies removed
4 from the network?

5 MS. HELLMAN: Objection, Your Honor. What does
6 this have to do with Linden Care, who is a specialty pharmacy
7 and the termination? There is nothing in this document about
8 specialty pharmacies.

9 THE COURT: Overruled.

10 A No, not that I recall. Are you speaking specifically to
11 compound pharmacies?

12 Q Well, no. There is a lot of different pharmacies,
13 right, in the world, and this is a strategy for dealing with
14 compound pharmacies specifically, right?

15 A The strategy was about controlling the costs of
16 compounded medications because they had become completely out
17 of control.

18 Q How many pharmacies were terminated as a result of this
19 meeting with the other pharmacy benefit managers?

20 A I'm not aware that we terminated any as a result of this
21 meeting.

22 Q Are you familiar with HM Compounding?

23 A Yes.

24 Q HM Compounding was terminated, correct?

25 A Yes, they were.

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1 Q Was HM Compounding targeted as a result of this meeting?

2 MS. HELLMAN: Objection, Your Honor.

3 A No.

4 MS. HELLMAN: Now we're talking about different
5 pharmacies that were terminated prior to this date. We're
6 getting so outside the scope of this.

7 THE COURT: Sustained.

8 MS. CLARK: I understand. The HM Compound case is
9 the *Paduano* case that is featured by Express Scripts in some
10 of their memorandum and discussed in ours, so it's not, you
11 know, an irrelevant issue, but I understand.

12 Q Did PCMA ever have meetings where the issues relating to
13 specialty pharmacies were discussed?

14 A I've never been to a PCMA event.

15 Q Were there other events like this one that we're looking
16 at in this exhibit where there was a webinar talking about
17 how to deal with specialty pharmacies?

18 A I'm sorry, one more time.

19 Q Well, you went to a webinar about problems with
20 compounding pharmacies, including strategies for removal of
21 pharmacies from the network, right? It's one of the things
22 that was discussed here, right?

23 A It was controlling the cost of compounded medications,
24 yes.

25 Q And one of the ways to do that was to remove the

1 pharmacies from the network, right?

2 A That is what was recommended on the slides.

3 Q And it also says that you can do extra auditing as
4 needed, right?

5 A Yes.

6 Q Did the pharmacy benefit managers have a similar
7 get-together or webinar relating to strategies for dealing
8 with perceived problems with specialty pharmacies?

9 A I've never attended one.

10 Q Are you aware of any?

11 A No.

12 Q And it's your testimony that you have never been to a
13 PCMA meeting?

14 A That's correct.

15 Q Have you ever seen the agendas for PCMA meetings?

16 A No.

17 Q What are plan design controls termed in this webinar?
18 Do you know what that term means?

19 A I have a general understanding of it, but again, it's
20 outside of my responsibilities and I'm not on the plan design
21 side of Express Scripts.

22 Q Going back to Express Scripts' function as a pharmacy
23 benefit manager. We talked about the formulary and the
24 recipe or the menu of drugs that are available to members in
25 a particular. Do you remember that testimony?

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1 A Regarding formulary?

2 Q Right.

3 A Yes.

4 Q Isn't it right that the plan can at any time decide to
5 change its formulary?

6 A Yeah.

7 Q And if there is drugs that are too expensive or not
8 effective, the plan can just take them off the formulary,
9 right?

10 A Yes. And by plan you mean the health plan?

11 Q The health plan.

12 A Okay, yes.

13 MS. CLARK: I need just a moment, Your Honor, to
14 check my notes.

15 THE COURT: Yes.

16 Q And this is a true and correct copy of webinar materials
17 from the webinar that you attended that we just talked about?

18 A I can't say. It appears to be. I can't say from more
19 than a year ago.

20 Q And is this a document that you brought back to your
21 office and filed somewhere?

22 A Yes. I think I had it electronically, yes.

23 Q Did it become part of Express Scripts' records, business
24 records, at that point once you downloaded it?

25 MS. HELLMAN: Objection. I don't know if she knows

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1 what it means to be become part of Express Scripts' business
2 records.

3 THE WITNESS: I don't.

4 THE COURT: Sustained.

5 Q Did this document become part of your records as an
6 employee of Express Scripts?

7 A Yes.

8 Q And it was downloaded into the system and became part of
9 the Express Scripts body of records and information, right?

10 MS. HELLMAN: Same objection, Your Honor.

11 THE COURT: Well, I think -- overruled.

12 A It's on my computer but it's probably on my personal
13 drive not some shared drive.

14 Q But it's also in your file in your office, right?

15 A Yes.

16 Q Okay.

17 MS. CLARK: Your Honor, I'm going to ask that this
18 be admitted into evidence as a business record.

19 THE COURT: Any objection?

20 MS. HELLMAN: Well, Your Honor, this is marked
21 confidential. I don't know for proprietary and confidential,
22 I have no idea how they obtained it. I can tell you it was
23 produced by Express Scripts subject to a protective order in
24 a different case. So I do. And also, Your Honor, it simply
25 has no relevance to this case. This case is about Linden

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1 Care, it is not about this.

2 MR. COST: Your Honor, I actually went to the AIS
3 website and they had a link and I paid the fee and I was able
4 to download it. I have the e-mail, I can show you.

5 THE COURT: Objection overruled and the Court will
6 admit P18. Thank you. My copy does not say confidential on
7 it.

8 MS. CLARK: Nor does mine.

9 MS. HELLMAN: The one I'm looking at, the one right
10 here, I mean that's why some of it's redacted off the bottom,
11 proprietary and confidential. I'm looking at the copy of
12 this one right now on the computer.

13 MS. CLARK: I am too.

14 MR. COST: I see where she's saying. That's what I
15 was sent by AIS.

16 MS. CLARK: Publicly available on the web.

17 MS. HELLMAN: If you see, if you look at the pages
18 down at Optum, some of it's redacted but it starts with
19 confidential property of Optum, do not distribute or
20 reproduce without express permission of Optum.

21 MS. CLARK: It's in the public domain. We
22 downloaded it from the public website, so it couldn't be that
23 confidential.

24 THE COURT: Mr. Cost, is this a website that anyone
25 can go to, Atlantic Information Services, Inc?

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1 MR. COST: Yes, it's a website, Your Honor.

2 THE COURT: The Court will admit P18.

3 (Plaintiff's Exhibit 18 received in evidence.)

4 MS. CLARK: I have no more questions.

5 MS. HELLMAN: Are you done with your case?

6 MS. CLARK: Depending on your cross-examination, I
7 may have Mr. Kantor.

8 MS. HELLMAN: If I could, I think we're moving into
9 our case, just reserve some time to give a brief opening
10 statement.

11 THE COURT: Yes.

12 MS. HELLMAN: Thank you.

13 *CROSS-EXAMINATION BY MS. HELLMAN:*

14 Q I'm going to work as quickly as I can to get you out of
15 here. Mrs. Roberts, we've talked a lot about Express Scripts
16 today, and the Court's heard a lot about, but I want to take
17 a step back to pharmacy benefit manager. What is a pharmacy
18 benefit manager?

19 A It is an entity that works with third-party payers to
20 facilitate benefit design and provide a network of pharmacies
21 to members of those third-party payers.

22 Q And as part of that service, does Express Scripts have a
23 pharmacy network?

24 A Yes, we have a pharmacy network of, as I stated earlier,
25 about probably 70,000 pharmacies in total, 65,000 retail

1 pharmacies, home infusion, long term care.

2 Q And then you indicated that Express Scripts contracts
3 with payers. Pre the PBM world was pharmacies contracting
4 directly with insurers, payors?

5 A Yes, that's my understanding, yes. If a pharmacy wanted
6 to service the members of Blue Cross/Blue Shield of Alabama,
7 then they would have had to contract directly with that
8 entity.

9 Q So if they wanted to serve members from 1,500 different
10 insurers or plans, it would have 1,500 different contracts,
11 is that right?

12 A That's correct.

13 Q And the contract between in this case Linden Care and
14 Express Scripts does then as part of that contract Express
15 Scripts reimburse Linden Care directly for their prescription
16 claims?

17 A Correct. We would, yes, we facilitate that on behalf of
18 all of those health plans.

19 Q So, in other words, instead of having 1,500 or 2,000
20 different contracts, there is one contract for a pharmacy, is
21 that correct?

22 A That's correct.

23 Q And similarly is there one contract for Blue Cross/Blue
24 Shield?

25 A Correct.

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1 Q You talked a little bit about the contractual
2 relationship, and I think you mentioned there was 70,000
3 pharmacies in the network, is that correct?

4 A Yes.

5 Q Why would a pharmacy want to be under a contract with
6 Express Scripts?

7 A Primarily to have access to the more than 60 million
8 members, beneficiaries that are under the Express Scripts
9 umbrella of clients.

10 Q And what does Express Scripts require of its pharmacies
11 to be in this contract, to have the access to the 90 million
12 members -- or 60 million members?

13 A Sixty. Well, we require the first and foremost to
14 comply with the terms and conditions of their contract with
15 Express Scripts, to comply with the laws of the states where
16 they are licensed, to have the appropriate documentation and
17 insurance that is required.

18 Q And we've heard a lot about Linden Care Pharmacy.
19 That's a pharmacy that you're familiar with?

20 A Yes.

21 Q And I want to talk a little bit about the agreement
22 between Express Scripts and Linden Care.

23 MS. HELLMAN: Your Honor, may I approach her just
24 to give her a copy?

25 THE COURT: Yes.

1 MS. HELLMAN: I know everybody else has a copy.

2 Q And Ms. Roberts, I've handed you the Provider Agreement
3 between Linden Care and Express Scripts, do you see that?

4 A I do.

5 Q And are you also familiar with the Express Scripts
6 Provider Manual?

7 A Yes.

8 Q And does the prior agreement that's in front of you and
9 the Provider Manual constitute the agreement between Express
10 Scripts and Linden Care?

11 A Yes, the two together.

12 Q If you could turn to Section 7.15 of this agreement,
13 please?

14 A Okay.

15 Q And does this agreement have an arbitration provision?

16 A Binding arbitration.

17 Q And according to this agreement, where is that
18 arbitration supposed to take place?

19 MR. COST: Objection, Your Honor.

20 THE COURT: Sustained.

21 Q Ms. Roberts, there has been some testimony that Linden
22 Care is a, quote, unquote, "specialty pharmacy." You've
23 heard that testimony?

24 A I did hear that testimony.

25 Q What is a specialty pharmacy?

1 A Well, my definition of a specialty pharmacy is a
2 pharmacy that primarily manages and dispenses medications for
3 particular disease states, very high touch disease states
4 such as hemophelia or HIV, and medications that, you know,
5 there is very specific medications that are related to those
6 disease states.

7 Q And as somebody familiar with a specialty pharmacy, do
8 you consider Linden Care to be a specialty pharmacy?

9 A No. They don't really fall into the definition of a
10 specialty pharmacy that I have and they didn't contract as a
11 specialty pharmacy.

12 Q And you testified earlier questions from Ms. Clark that,
13 in fact, Linden Care contracted with you as a retail
14 pharmacy, is that correct?

15 A Correct.

16 Q And I want to go back, if you could for a second, to
17 Section 1.14, which is the definition of retail provider?

18 A Yes.

19 Q And Ms. Clark talked you to about this definition but I
20 want to look at that very first sentence. As a retail
21 provider defined as somebody who primarily fills
22 prescriptions at a store front?

23 A Fills and sells prescriptions via retail store front
24 location, yes.

25 Q And does the definition of retail provider in this

1 agreement, does it exclude mail order pharmacies?

2 A It does exclude mail order pharmacies.

3 Q And Ms. Roberts, if you could turn to Section 7.16 of
4 the agreement.

5 A Yes.

6 Q And this section is entitled Representations and
7 Warranties, is that correct?

8 A Correct.

9 Q And Section 7.16(b), is Linden Care representing a
10 warranty to Express Scripts that it is -- 7.16(a), is Linden
11 Care representing a warranty to Express Scripts that it meets
12 the definition of a retail provider?

13 A Yes, that's correct.

14 Q And let's go on and go down to the next representation,
15 specifically 7.16(b). Here is Linden Care representing a
16 warranty to Express Scripts that it's appropriately licensed?

17 A That's correct.

18 Q And then going down one more, 7.16(c), here is Linden
19 Care representing that the questions contained on the
20 provider certification are true and accurate and Linden Care
21 will notify Express Scripts of any changes?

22 A That's correct.

23 Q And were these representations made by Linden Care to
24 become part of the Express Scripts network?

25 A Yes, they were.

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1 Q If you could briefly just go to Section 4.2, please. Is
2 4.2 the termination section?

3 A Immediate termination, yes.

4 Q And are you at section 4.2(c)?

5 A Yes, I am.

6 Q We've heard a lot of testimony about right to cure and
7 notice period. Does 4.2(c) provide grounds that the pharmacy
8 may be immediately terminated upon written notice?

9 MR. COST: Objection, Your Honor. The document
10 speaks for itself.

11 THE COURT: Sustained.

12 Q Let's talk a little bit about Linden Care's provider
13 certification. What was the pharmacy do to become a pharmacy
14 in the network, in the Express Scripts' network?

15 A Must complete a provider certification, answer a host of
16 questions. They must give us all of their demographic and
17 license information, describe their practice type, and
18 produce their licensure and proof that it's in good standing,
19 not be excluded by any state or federal agencies and, you
20 know, hold the appropriate insurance.

21 Q Once a provider has been admitted into the Express
22 Scripts network, are they subject to re-credentialing?

23 A Yes, we re-credential, we can re-credential as often as
24 we need to, but routinely every three years.

25 Q And what's the importance of the provider certification

1 that a pharmacy submits in connection with this credentialing
2 or re-credentialing process? Why is it important to Express
3 Scripts?

4 A Well, it tells us about the pharmacy. It tells us about
5 their business practices. It helps us to understand the
6 types of medications they may dispense. It helps us to
7 understand the patient population that they might service
8 such as Medicare, Medicaid, Workers' Compensation, so it's
9 important for us to understand what kind of pharmacy they are
10 so they are able to be contracting.

11 Q If Express Scripts has an audit department and someone
12 from the audit department audits Linden Care, why do you need
13 a provider certification?

14 A The provider certification, you know, it states that the
15 information is true and accurate. And, you know, the
16 provider certification, we're not going to go out to every
17 state Board of Pharmacy just to check to see if the pharmacy
18 has a license. We need them to tell us that they have a
19 license in that state so then we can go check to see if
20 they're appropriately licensed.

21 Q When an audit is done, I think you mentioned this
22 earlier and I want to make sure it's clear for the Court, you
23 said when an audit happens, it's an audit of claims. What
24 does that mean?

25 A Well, Express Scripts through its retail pharmacies

1 adjudicates probably about 3 million claims a day and so the
2 audit department on a daily basis looks, we call them a desk
3 audit, they're looking at claims to see if they paid
4 appropriately, if paid under the right benefit for the
5 member, if the quantity is appropriate. When they do field
6 audits then they are going a little bit deeper, they're
7 looking at, they pick a random sampling of claims for that
8 particular pharmacy and they look to see if the pharmacy has
9 appropriate inventory, they check to see if signature logs
10 are appropriate and that a patient has picked up the
11 medication, or if it has been delivered then there is a type
12 of signature for delivery.

13 Q Do audits provide the type of information to Express
14 Scripts that the information contained in the provider
15 certification provides to Express Scripts?

16 A No, they're very different.

17 MS. HELLMAN: Your Honor, may I approach?

18 THE COURT: Yes.

19 MS. HELLMAN: I have just handed the witness the
20 provider certification, which is also part of the record.

21 MR. COST: Identification of it, the document
22 number?

23 MS. HELLMAN: Yes. It was Exhibit 4 of Bonnie's
24 declaration, document 9-3.

25 Q Ms. Roberts, is this the provider certification

1 submitted by Linden Care pharmacy?

2 A It appears to be from December of 2013, so it was a
3 re-credentialing verification form.

4 Q If you could go to page 4 at the bottom, the second page
5 of the document. And is this the type of information that
6 Express Scripts includes on its provider certification, the
7 type of practice, the business information, are these the
8 questions it's looking for answers?

9 A That's right, yes.

10 Q And I want to focus on the type of practice that that
11 logs. Did Linden Care provide Express Scripts with what
12 types of different pharmacy practices it was engaged in?

13 A Yes. They indicated they were 50 percent open door
14 retail community, indicated 39 percent for local and out of
15 state mail order, Workers' Comp. is 10 percent, and 1 percent
16 compound.

17 Q And if you add up those numbers, does that equal
18 100 percent?

19 A It equals 100 percent.

20 Q I'm looking at the different types of practices on here.
21 How much specialty did Linden Care indicate they do?

22 A They didn't indicate that they do any specialty,
23 0 percent.

24 Q If you could turn back to the first page of this
25 document. Who did Linden Care indicate was their pharmacist

1 in charge?

2 A Jordan Fogel.

3 Q Why does Express Scripts ask a pharmacy who their
4 pharmacist in charge is?

5 A Well, pharmacist in charge is the managing person at the
6 pharmacy. They're responsible for all aspects of the
7 pharmacy. We are obligated to do our due diligence on the
8 pharmacist in charge. Again, to ensure they're appropriately
9 licensed into any of the states that they may be dispensing
10 medications, and again if they ensure that they're not
11 excluded, and we even have to check the Social Security
12 master file to ensure that they're not an impostor of some
13 kind.

14 Q And Ms. Roberts, the provider certification that I
15 handed you, is that signed on page 6?

16 A Yes, by Mark Trimmer.

17 Q And is there a verification right above his signature
18 about all the answers being true and accurate?

19 A Yes.

20 Q And does Express Scripts also require its pharmacies to
21 update Express Scripts if something changes?

22 A Yes, that is an ongoing requirement.

23 Q And why does Express Scripts want to know if the
24 information is changed?

25 A Well, again, we need to understand if the pharmacy is

1 appropriately licensed. Importantly, we need to know if they
2 have been disciplined in some way, either the pharmacy
3 itself, the owner or the pharmacist in charge. We need to
4 understand if there are any patient safety issues at hand.

5 Q If a pharmacy's business has changed, does Express
6 Scripts want to know it?

7 A Yes. Again, it goes back to are they appropriately
8 licensed.

9 MS. CLARK: Your Honor, I have an objection at this
10 point. I mean, the issues thus far have been framed by the
11 termination letter. This termination letter never said
12 anything about these issues related to the certification,
13 other than potentially the mail order issue, so I think we're
14 getting off on tangents that can't possibly be the basis for
15 termination.

16 THE COURT: I believe it's included in her
17 declaration, though, that she filed in connection with this
18 case.

19 MS. HELLMAN: Thank you, Your Honor.

20 Q Subsequent to Linden Care providing this provider
21 certification on December 20, 2013, did Express Scripts learn
22 that some misrepresentations had been made?

23 A Yes.

24 Q And I want to turn back to the type of practice
25 specifically on page 2 of this document. You testified or

1 the provider certification indicates that Linden Care does
2 39 percent mail order, local and out of state, do you see
3 that?

4 A Yes, I do.

5 Q Was that an accurate representation of its business?

6 A Not -- no. We found that it has 70 percent out of state
7 alone.

8 Q And does that not include what ships in state?

9 A Correct.

10 Q And I want to go back for a second to the Provider
11 Agreement, specifically section 1.14. Would you consider a
12 pharmacy that does 70 percent mail order just out of state to
13 be a retail provider?

14 A No. We would consider that to be a mail order provider.

15 Q And is that because they're not primarily dispensing
16 prescriptions from their retail?

17 A Yes, that's correct.

18 Q And if you could stay with the Provider Agreement and
19 look at Section 7.16(a), was Linden Care's representation and
20 warranty that it was a retail provider false?

21 A Yes.

22 Q If we could go back to the provider certification again.
23 And you indicated earlier that Linden Care stated nothing of
24 the specialty percentage. If you could flip to the next page
25 of provider certification, page 5?

1 A Okay.

2 Q Skip that question for a minute. In addition to
3 shipping 70 percent of its prescriptions out of state, did
4 Express Scripts also learn that Linden Care was shipping to a
5 state in which it did not hold a license?

6 A Yes. We found that there were claims being shipped to
7 California where it did not hold a license.

8 Q Now does every state require a license within which to
9 ship?

10 A There are few exceptions. California requires a
11 license.

12 Q And does Express Scripts make this requirement?

13 A No. It's the state Board of Pharmacy that makes that
14 requirement.

15 Q Are you familiar with a requirement that requires a
16 license to ship into state?

17 A I'm sorry?

18 Q Let me ask a better question. Do you know if the
19 California Board of Pharmacy has a diminimus exception?

20 A It does not.

21 Q And have you had a chance to look at the claims that
22 Linden Care was shipping into the State of California?

23 A Yes, I did review those claims.

24 Q And there has been some testimony in this case that
25 those were shipped for emergency basis for people on

1 vacation. Did you hear that?

2 A I did hear that.

3 Q And in reviewing the claims data, did it indicate to you
4 that these prescriptions were sent on an emergency basis or a
5 one-off basis?

6 A Well, what I saw was that there were more than a dozen
7 patients that had addresses in California and received
8 multiple month over month shipments.

9 MS. CLARK: Your Honor, I just have an objection.
10 This is really hearsay, testifying about a document that was
11 never identified, that we have never been provided with, that
12 we've asked for repeatedly.

13 THE COURT: Ms. Hellman, do you have some evidence
14 that you're going to put in on this issue?

15 MS. HELLMAN: Yes. Yes. And Your Honor, I mean,
16 just to Ms. Clark's points, hearsay has been most of what
17 I've been hearing today in terms of not knowing who
18 declarants are or witnesses are, so we just ask a little
19 leeway on the hearsay because we've heard a lot of it today.

20 THE COURT: Why don't we get to the evidence.

21 MS. CLARK: Your Honor, we previously objected to
22 this document. Our objection was sustained. I raise the
23 same objection for the same reason. We don't have it. We
24 weren't provided with it. We asked for it. They declined to
25 provide it. And it would be very difficult for us at this

1 point to be seeing this document for the first time in the
2 middle of this proceeding.

3 THE COURT: Do you have it now, Ms. Clark?

4 MS. CLARK: It was provided a short time ago during
5 this proceeding.

6 THE COURT: Overruled.

7 MS. HELLMAN: Thank you, Your Honor.

8 Q Ms. Roberts, handing you what's marked Defendant's
9 Exhibit 6 and ask if this is the claims data that you
10 reviewed?

11 A This is the claims data I reviewed, yes.

12 Q And certain columns have been redacted for HIPAA
13 reasons. Can you explain to the Court what this claims data
14 is, what does it represent?

15 A Well, it represents that we received a claim submitted
16 by the NCPP or NAPP number, which is column A, that that
17 column tells us who the pharmacy is, and then of course the
18 name of the pharmacy is listed there as well as Linden Care.
19 We have prescription numbers, dates of service, the fill
20 quantity, the carrier name, being who the member was insured
21 through, and then there are member addresses that are listed.

22 So to me what it says to me is that there were claims
23 shipped from Linden Care on a specific date to a member at
24 this address.

25 Q And Mrs. Roberts, I don't want to spend much more time

1 on this, I just want to look at this one. If you could go
2 about three-quarters of the way down, do you see the carrier
3 Anthem Blue Cross of Cal?

4 A Yes.

5 Q Are you aware of an Anthem Blue Cross of California
6 plan?

7 A Yes.

8 Q Is that a client of Express Scripts?

9 A Yes, it is.

10 Q And if you go over a little further to the right, do you
11 see the initials JM?

12 A Yes, I see those initials.

13 Q Does this claim statement at least reveal a number of
14 prescriptions to JM over a period of many months being
15 shipped into California?

16 A Yes, it does.

17 Q And if you flip through this document, Ms. Roberts, is
18 there any address on here other than an address in the State
19 of California?

20 A All the addresses are in California.

21 Q Thank you. I want to go back to the provider
22 certification again. You testified about the PIC, the
23 pharmacist in charge, that was identified by Linden Care. At
24 some point did Express Scripts learn that that was no longer
25 accurate?

1 A Yes. We learned most recently that that's not accurate.

2 Q And was that another misrepresentation by Linden Care?

3 A Yes, because they did not submit an update to Express
4 Scripts.

5 Q And that's a good point. Does Express Scripts view a
6 breach of the agreement whether it's something was inaccurate
7 when you made it or you failed to update it?

8 A Correct.

9 MS. CLARK: Your Honor, I just have the same
10 objection. I don't know how this can be relevant to the
11 termination when it was never even cited or raised as a basis
12 for termination. This is all post hoc.

13 THE COURT: It is post hoc but it was in
14 Ms. Roberts' affidavit.

15 Q Ms. Roberts, we talked about some of the claims data
16 that Express Scripts and the visibility. If Express Scripts
17 has visibility into every claim submitted by a pharmacy,
18 wouldn't Express Scripts know that Linden Care was shipping
19 scripts into the State of California without a license?

20 A Well, we may have that information in our system but
21 we're not -- we're not looking at the information in the
22 aggregate. Again, that's why we depend on the provider
23 certification for the providers to tell us if they have a
24 license in other states and if they plan to be shipping
25 there.

1 Q Would it be possible for Express Scripts to look at each
2 claim submitted by the 70,000 pharmacies in its network?

3 A It would be impractical and with 3 million claims coming
4 through on a daily basis.

5 Q Does Express Scripts have to trust the pharmacies that
6 are in its network are following its rules and laws?

7 A Right. We have to trust the information that's
8 presented to us by the pharmacy and we have to rely on them
9 to be truthful and accurate in the information that they're
10 presenting.

11 Q Does a pharmacy such as Linden Care, and earlier you
12 talked about what a formulary is, do they agree to use best
13 efforts of formulary compliance?

14 A Yes, that's part of the agreement.

15 Q And Ms. Clark asked you a lot of questions about Horizon
16 and I want to step back for a minute. Are the Horizon Drugs
17 on the Express Scripts' national preferred formulary?

18 A Horizon Drugs are not on the Express Scripts national
19 preferred formulary.

20 Q And did it concern Express Scripts a high number of
21 drugs being dispensed by Linden Care that were not on the
22 national formulary?

23 A Yes. It made us stop and take a look.

24 Q I'm going to go back again to misrepresentations that
25 were made and that you testified to and the failure to update

1 the provider certification. Did these actions violate Linden
2 Care's contract with Express Scripts?

3 A Yes. It violated the contract and it caused us an
4 enormous amount of mistrust.

5 Q Express Scripts ultimately terminated Linden Care,
6 correct?

7 A Yes.

8 Q Why didn't Express Scripts give notice to Linden Care of
9 the termination?

10 A So notice was provided on the day of the letter delivery
11 that they would be terminated.

12 Q I'm sorry, advanced notice of the termination?

13 A We felt that finding that they had broken the law and
14 shipped to a state where they were not properly licensed was
15 egregious enough to warrant an immediate termination.

16 Q And there has been a lot of testimony today about Linden
17 Care's patients, the Express Scripts' members, and some
18 insinuation that Express Scripts doesn't take this into
19 account at all. And my question to you is, does Express
20 Scripts take into account its members in terminating a
21 pharmacy?

22 A Yes. They are a consideration, but again, the
23 consideration, it goes to is it a pharmacy that we can trust.
24 If we can't trust the pharmacy and what they tell us, can we
25 trust them with our members. And so, you know, we're looking

1 at the integrity of our network and who we're sending our
2 members to for care.

3 Q And you touched on it briefly, but I want to go back for
4 a minute and I want to talk about what Express Scripts has
5 done sitting here today from ten days ago, what has Express
6 Scripts done with respect to its members?

7 A So, all of the health plan clients, all of the clients
8 were notified immediately that termination had been made of
9 this pharmacy and because of the, you know, number of clients
10 and members involved, it took some coordination to get member
11 letters out. But, you know, as I stated earlier, we have
12 93 percent of those letters that have gone out.

13 Q I want to back up for a minute. You talked about the
14 clients. When does Express Scripts tell its clients that
15 this pharmacy is going to be terminated from the network?

16 A That information was made available immediately.

17 Q And do you know approximately how many letters Express
18 Scripts has sent out to the members?

19 A Approximately 6,200. I'm not sure of the exact number.
20 I would like to just add that sometimes our clients control
21 when those letters can go out. You know, many times the
22 clients will want to review a letter before it goes to its
23 members, they will want to have it customized with their logo
24 and they want it to look like it comes from them, so that can
25 take a little bit longer in the process.

1 Q But today your testimony that 93 percent of that number
2 is over 6,000 letters that have gone out, is that correct?

3 A Yes.

4 MR. COST: Objection.

5 Q And do those letters advise the members what to do in
6 light of this termination?

7 A Yes. It advises them to call Express Scripts or to go
8 online and use the pharmacy locator or talk with their
9 doctor.

10 Q And Ms. Roberts, since this termination happened ten
11 days ago, has Express Scripts been willing to work with any
12 individual member who was unable to locate a pharmacy?

13 A Absolutely. We're always willing to work directly with
14 the members.

15 Q And does Express Scripts today still remain willing and
16 ready to help any identified member that cannot find an
17 alternative pharmacy?

18 A Yes, absolutely. I would like to, you know, know the
19 list of members that are having difficulty so that we can
20 facilitate on their behalf.

21 Q You mentioned that you told clients. Did any clients
22 complain about this termination?

23 A I have not heard of any client complaints.

24 Q And we've talked a lot about the pharmacies that are
25 available in the State of New York. But at least with those

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1 members that reside outside of New York, 70 plus percent
2 that's being shipped to, are they able to get their
3 medications at any pharmacy that are around them or that can
4 ship it to them?

5 A Yes.

6 Q So, in other words, we're not limited to New York
7 pharmacies, is that fair?

8 A That's fair, we're not limited to New York pharmacies.

9 Q And Ms. Roberts, if this Court orders Express Scripts to
10 get back into a contractual relationship with Linden Care,
11 what's the harm to Express Scripts?

12 A Well, I mean, we want a network of pharmacies that we
13 can depend on. It's an integrity issue. You know, we don't
14 trust the pharmacy any longer and it would be, I think,
15 difficult to trust them going forward. We would -- I think
16 it would cause confusion and, you know, could be harmful to
17 our reputation overall.

18 Q Does Express Scripts want to continue or not continue --
19 does Express Scripts want to do business with Linden Care?

20 A No, not at this point, no.

21 MS. HELLMAN: That's all the questions I have.

22 THE COURT: Thank you. Ms. Roberts, are you aware
23 of any other situations where Express Scripts discovered that
24 a provider shipped out of state without a license?

25 THE WITNESS: I am aware. It has come to our

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1 attention on occasion. It is not a frequent incident.

2 THE COURT: On other occasions when it came to your
3 attention, what happened?

4 THE WITNESS: The provider would have been
5 terminated.

6 THE COURT: Are you aware of other situations where
7 a provider was terminated?

8 THE WITNESS: Yes.

9 THE COURT: And are you aware of any other
10 situations where a provider was terminated effective
11 immediately?

12 THE WITNESS: Yes.

13 THE COURT: In what situations has Express Scripts
14 done that?

15 THE WITNESS: Most recently we made an immediate
16 termination of several pharmacies that were found to be
17 directly linked to a pharmaceutical manufacturer.

18 THE COURT: Thank you, Ms. Roberts.

19 REDIRECT EXAMINATION BY MS. CLARK:

20 Q Which manufacturer is that?

21 A Valeant Pharmaceutical.

22 Q Valeant Pharmaceutical. That was the Philidor
23 situation?

24 A Yes.

25 Q And Philidor was involved and found guilty of criminal

1 responsibility, correct, for all kinds of --

2 A I haven't really kept up with the news, I'm sorry.

3 Q So in that situation, the Philidor/Valeant situation,
4 there was an investigation and a settlement with the
5 authorities, correct, you're aware of that?

6 A I'm sorry.

7 Q So there was a plea of guilty that triggered a
8 termination. And there is other things that can trigger an
9 immediate termination too, right, like an indictment?

10 A Yes.

11 Q Exclusion from Medicaid?

12 A Yes.

13 Q Can be a situation under certain circumstances?

14 A Yes.

15 Q Right. And a conviction can trigger an immediate
16 termination?

17 A Yes.

18 Q But none of those extreme circumstances existed here,
19 did they?

20 A Not that I'm aware of, no.

21 Q Otherwise, it was primarily a suspicion that Linden Care
22 was shipping to California based upon the data that you just
23 looked at, correct?

24 A Yes.

25 Q And you would agree it would be important to make sure

1 your data is correct when you're using it to immediately
2 terminate a pharmacy that's taking care of thousands of
3 people?

4 A There aren't thousands of people on this list.

5 Q I'm talking about the pharmacies taking care of
6 thousands of Express Scripts members, right?

7 A Correct.

8 Q And it's important to make sure your data is accurate,
9 right?

10 A Yes.

11 Q So the data you have here indicates what the permanent
12 residence might be of the member, correct, that's what that
13 field says?

14 A That's right.

15 Q That field doesn't indicate where the person was when
16 the medication was shipped, does it?

17 A It does not.

18 Q No. And do you know what percentage of Express Scripts
19 members in California are snowbirds or Arizona birds or
20 people that travel for part of the year?

21 A No, I wouldn't know that.

22 Q And there would be absolutely nothing wrong with Linden
23 Care sending a prescription to a snowbird in Florida, right?

24 A As long as they have a Florida license.

25 Q That's exactly right. And Linden Care has licenses in

1 49 states, right?

2 A Yes.

3 Q And Express Scripts audited Linden Care many times
4 during this 2014-2015 time period, correct?

5 A I don't know.

6 Q You heard that. Do you have any reason to disagree with
7 the Linden Care executives who said that they were regularly
8 audited by Express Scripts?

9 A I don't have any reason to disagree with that.

10 Q And those audit materials, they're at Express Scripts'
11 offices, aren't they?

12 A Yes.

13 Q Okay. And you could go over there and look at those
14 audit materials if you so wished, couldn't you?

15 A I guess I could.

16 Q And those materials would include the actual delivery
17 tickets for the actual prescriptions that are referenced on
18 this chart, including the address to which they were actually
19 delivered, isn't that right?

20 A If there had been an onsite audit that included any of
21 those prescriptions.

22 Q On site or fax or desk audit, if the delivery
23 information was provided by Linden Care as Linden Care
24 executives have testified, it would be in Express Scripts'
25 files and it would tell you where the prescription was

1 delivered to, correct?

2 A Yes.

3 Q Did you give any consideration to the fact that this may
4 be a list of California residents who travel and need
5 prescriptions when they're traveling in other states where
6 Linden Care does have a license?

7 A I would say that is a possibility.

8 Q Did you consider that before today, about handing this
9 information to the Court?

10 A Did I? I didn't hand it to the Court.

11 Q No, did you consider that fact before you relied upon
12 this information here today in court?

13 A It is a consideration, Ms. Clark.

14 Q And you knew that before today, correct?

15 A I reviewed the -- I knew what before today?

16 Q You had that consideration before today, before you came
17 into court today?

18 A I reviewed these documents today.

19 Q Is there any reason you didn't tell the Court in
20 response to your questions that a simple explanation for this
21 problem might be the mobility of these Express Scripts
22 members and that should be something that should be looked
23 into and that you have the documents in your office?

24 MS. HELLMAN: Objection, Your Honor. She never
25 said she had the documents in her office. She is being very

1 argumentative with the witness.

2 THE COURT: Overruled.

3 Q Those documents are in Express Scripts' offices, right?

4 A I can't say any of these claims would have been subject
5 to an audit where we would have the label information.

6 Q Did you look and see?

7 A I did not look and see.

8 Q Thank you. Let's turn for a moment to the Provider
9 Agreement that we've been talking about. You said that there
10 is a provision in the Provider Agreement that puts a burden
11 on the pharmacy with respect to formulary management. Do you
12 remember that testimony?

13 A In the Provider Manual, I believe.

14 Q Do you know where that is in the Provider Manual?

15 A I would need to look at it. I cannot cite where it is.

16 Q Would you be able to look at the index of the Provider
17 Manual and see if you could find that provision?

18 A Section 4 is formulary review. Section 4.1 under
19 overview formularies in bold type.

20 Q Can you give me a page number so I can follow along?

21 A Sure. 31.

22 Q And this document says that, "Network provider
23 pharmacists should make the best efforts to dispense the
24 formulary drug and/or product and except for generic
25 substitution or reasons of medical necessity should never

1 switch a member from the formulary drug and/or product to a
2 non-formulary drug or product." Do you have some evidence
3 that Linden Care violated this provision of the Provider
4 Agreement?

5 A I do not. But what I spoke to earlier was that Horizon
6 Pharmaceutical Drugs are not on the national preferred
7 formulary, and so that was a reason for us to look a little
8 bit closer.

9 Q Well, this provision doesn't refer to the national
10 formulary, does it?

11 A It refers to formularies.

12 Q Right.

13 A In general.

14 Q And each member has their own formulary, right?

15 A Well, the national preferred formulary is probably the
16 most widely used.

17 Q Well, but that's true. But the patients we're talking
18 about with Linden Care, they were following the formulary for
19 their plan, right? Correct?

20 A I hope so, yes.

21 Q Linden Care wasn't prescribing, was not filling
22 prescriptions for drugs that were not on the formulary? Am I
23 correct about that? You have no evidence that that happened?

24 A I have no evidence of that, no.

25 Q Why would you come into court and suggest that as a

1 basis for termination of Linden Care even after the fact?

2 That would be inaccurate, wouldn't it?

3 A What I said was that because Horizon Drugs are not on
4 the national formulary, that gave us pause to look a little
5 closer.

6 Q But Horizon Drugs are on the formulary of the patients
7 who got the drugs at Linden Care, right?

8 A I'm assuming so.

9 Q Let's take a look at the provider contract for a minute.
10 I'm going to show you a document that's already marked. It's
11 Exhibit (b)(2)?

12 MR. COST: To the supplemental declaration of
13 Mr. Weiner.

14 Q Do you recognize that document?

15 A No, I don't.

16 Q So you recognize that Provider Agreement but not this
17 2011 amendment to the Provider Agreement?

18 A I'm not familiar with all of the amendments to the
19 Provider Agreement, I'm sorry. The general Provider
20 Agreement I am much more familiar with.

21 Q Do you think it's important when you're terminating a
22 provider to look at the Provider Agreement that applies to
23 the state where the provider is?

24 A I would say that, yes.

25 Q And did you look at the 2011 amendments, New York

1 amendment to the Provider Agreement before you terminated --

2 A Ms. Clark, it would not be my responsibility.

3 Q Let me finish my question because we have to get it on
4 the record. Did you look at the 2011 Provider Agreement as
5 amended by this document before you terminated Linden Care
6 without notice or an opportunity to be heard?

7 A I did not personally look at this document.

8 Q Do you know if anybody at Express Scripts looked at this
9 document?

10 A I don't have any personal knowledge of that.

11 Q And looking at this document, looking at the letter
12 attaching the document, it says, this amendment expressly
13 incorporates DOH's updated standard clauses for managed care
14 provider contracts, which supersede the existing version,
15 preexisting version of such standard clauses, et cetera. Do
16 you see that?

17 A In the second paragraph, yes.

18 Q Right. So this amendment supersedes and controls over
19 what is in the master Provider Agreement, isn't that what it
20 says?

21 MS. HELLMAN: Objection, Your Honor. We're talking
22 about the New York amendment, talking about something
23 supersedes a prior agreement I think is a legal conclusion.

24 THE COURT: Sustained.

25 Q Does Express Scripts have any way of determining if it's

1 termination plan for a provider is in accordance with state
2 law? Is that something you look at?

3 A Could you repeat the question?

4 Q Well, let me back up. In your department you look at
5 California law, right, with respect to licensing
6 requirements, right, as part of your credentialing?

7 A With respect to licensing requirements, yes.

8 Q And when you're looking at terminations, do you look at
9 the state law termination requirements?

10 MS. HELLMAN: Objection, Your Honor. She asked
11 this question on her.

12 MS. CLARK: They opened the door with this witness.

13 THE COURT: Overruled.

14 A Since I'm not an attorney and it would not be within my
15 scope to review documents, I personally would not review.

16 Q Do you think it's important for Express Scripts to
17 follow state laws?

18 A Yes.

19 Q Have you since reviewed this document since Linden Care
20 was terminated?

21 A This document you just handed me?

22 Q Right.

23 A I have not.

24 Q Do you see on Section 3, page 3, this document says,
25 "The Provider Agreement shall be amended by adding the

1 following language as a new section immediately following the
2 last section of the Provider Agreement." Do you see where it
3 says that?

4 A I'm sorry, where?

5 MS. HELLMAN: Objection, Your Honor. The document
6 speaks for itself. She said she has never seen this.

7 THE COURT: Sustained.

8 MS. CLARK: Withdrawn.

9 Q Let's turn to the definition of specialty pharmacy.
10 Remember you testified earlier that in your mind Linden Care
11 was not really a specialty pharmacy, is that right?

12 A By my definition.

13 Q Where is your definition found?

14 A I didn't indicate that it was documented.

15 Q So that's just a definition that you have in your mind,
16 not one that's a matter of policy of Express Scripts?

17 A Not a matter of policy but more of -- I can't think of
18 the term I want to use.

19 Q Opinion?

20 A It is more of an industry opinion.

21 Q I'm going to turn to a document that's been filed.

22 MR. COST: Document 11-2.

23 Q Now, Accredo --

24 MS. CLARK: May I approach, Your Honor?

25 THE COURT: Yes.

1 Q Accredo is a specialty pharmacy, is that right?

2 A Yes.

3 Q And a specialty pharmacy that's wholly owned by Express
4 Scripts, is that correct?

5 A Correct.

6 Q Does Accredo provide any of the same drugs that Linden
7 Care provides?

8 A Not that I'm aware of, no.

9 Q They don't provide any of the non-narcotic pain
10 relievers that Linden Care provides, there is no overlap?

11 A I'm not aware that they do.

12 Q I'm going to show you this document and I'm going to ask
13 you to read the third paragraph, if you will?

14 MS. HELLMAN: I'm still trying to find --

15 MR. COST: Here.

16 THE COURT: Ms. Clark, for the record what are you
17 showing the witness?

18 MS. CLARK: Unfortunately, the top of the bar where
19 it has the docket number is obscured.

20 MR. COST: Attachment to affidavit filed on 11/12.

21 Q Do you see that this is an Express Scripts' press
22 release?

23 A Yes. I'm sorry, referring to the highlighted sections?

24 Q First I'm looking just at the document. Is that an
25 Express Scripts' press release, do you see that?

1 A Yes, I do see it.

2 Q Dated November 11th, 2015?

3 A Yes.

4 Q And it announces that they terminated Linden Care. Do
5 you see that on the top?

6 A Yes.

7 Q And once again, it recites the fact that they
8 predominantly dispensed Horizon Drugs. Do you see that on
9 top?

10 A It says, "We are also evaluating several other
11 pharmacies that appear to predominantly dispense Horizon
12 prescription drugs."

13 Q And then it says, "In addition, we are reviewing and
14 evaluating all similar captive pharmacy arrangements that we
15 know of and will work to identify others. By captive
16 pharmacies we mean those pharmacies that derive the vast
17 majority of their prescription volume from one manufacturer
18 or one product."

19 A I see that.

20 Q Is there a definition of captive pharmacy anywhere in
21 the Provider Agreement or in the manual?

22 A No. As I told you earlier, it's a new term for me.

23 Q So being a captive pharmacy wouldn't be a basis for
24 terminating the contract, would it?

25 A If it's not a defined term, it's what you're saying.

1 Q And looking at Express Scripts' definition of specialty
2 pharmacy in the next paragraph, it says, "It is important to
3 clarify the difference between niche pharmacies that are
4 designated by manufacturers to push a particular product.
5 And, two, specialty pharmacies like Accredo that deliver a
6 superior level of specialized care for patients living with
7 complex specialty conditions." Do you agree with that
8 definition of specialty pharmacy in Express Scripts' press
9 release?

10 A I do.

11 Q You were here today for the testimony of Dr. Weingarten,
12 right?

13 A Yes.

14 Q Do you disagree that Linden Care provides specialized
15 care for patients living with pain conditions?

16 A No, I don't disagree with that.

17 Q And turning to the certification which you might already
18 have in front of you?

19 A The provider certification?

20 Q Right. My copy is redacted so I hope you have the same
21 copy. It's exhibit, docket 16-4 in the record. Do you have
22 any evidence that at the time this document was filled out,
23 that Linden Care's representation about mail order, local,
24 out of state was inaccurate?

25 A I don't, but I do have -- I do know that they --

1 Q You don't have that information, do you?

2 A I don't have that information.

3 Q And that percentage would change every day if you looked
4 at it, right?

5 A It speaks more to the --

6 Q Excuse me, if you can answer my question. The
7 percentage of mail order that a pharmacy does could change on
8 a daily basis, couldn't it?

9 A We're asking about practice types, so, yes, the
10 percentage could change on a daily basis.

11 Q Thank you. And Express Scripts doesn't expect --

12 MS. HELLMAN: Your Honor, let her finish her
13 answer, please.

14 MS. CLARK: Fair enough.

15 Q Express Scripts doesn't expect a pharmacy every day to
16 fax in changes in this, these percentages that are offered,
17 right?

18 A No. But we would expect a pharmacy to tell us if their
19 general practice type changes.

20 Q So there is some standard for when there needs to be a
21 unilateral update or change between credentialing cycles, but
22 is there any sort of standard or definition of when that
23 needs to occur?

24 A There is a -- the Provider Manual states that they
25 should update us upon any change in practice.

1 Q Well, actually, the agreement itself says that if there
2 is a change in the information, that makes the verification
3 untrue or inaccurate. This representation on this date never
4 became untrue or inaccurate. It stated 39 percent. There
5 was no information from Linden Care that that was inaccurate
6 or untrue when that statement was made. Do you have
7 information to the contrary?

8 A I do not. But I do know that they list one out of state
9 licensure at the time of this certification and that
10 information obviously changed if they are licensed in 49
11 states.

12 Q The --

13 MS. CLARK: Move to strike as nonresponsive.

14 Q The form has a bunch of check boxes with various terms
15 such as mail order, local, out of state. Is there any
16 definitions of those terms?

17 A There are not, other than retail.

18 Q And do you know if there is any instructions that would
19 tell somebody if these are mutually exclusive and should add
20 up to 100 or any sort of instructions like that?

21 A If a pharmacy or provider has questions regarding this
22 application or this certification, we have an 800 number
23 where they can call and seek information.

24 MS. CLARK: Move to strike as nonresponsive, Your
25 Honor.

1 THE COURT: Denied.

2 Q I'm asking you, is there any instructions that come with
3 the form that say your percentages should add up to 100 or,
4 for example, you could certainly have 30 percent Medicaid and
5 50 percent open door retail community, correct?

6 A Yes.

7 Q So you could have more than 100 percent add up here
8 given all these different boxes?

9 A That's exactly right.

10 Q Is there a definition given for self administered
11 injectable specialty anywhere?

12 A There are no definitions on this document.

13 Q Now, you mention that there was a lack of trust that was
14 at the heart of the decision to make an immediate
15 termination. Do you remember that term you used?

16 A Yes, I did.

17 Q Was part of that mistrust because Linden Care was doing
18 a large part of its business with Horizon?

19 A That would be part of it, yes.

20 Q And Horizon and Express Scripts are in a legal battle
21 which also began on November 11th over \$140 million in
22 rebates, is that right?

23 A That's what I've read.

24 Q Did that battle with Horizon over \$140 million in
25 rebates and all the press contribute to the mistrust of

1 Linden Care?

2 A I don't have any knowledge about the rebate battle.

3 Q You were asked a lot of questions about what efforts
4 Linden Care made to feed to Express Scripts information about
5 patients that were complaining about having lost their
6 pharmacy with no notice. Do you remember that testimony?

7 A Yes.

8 Q Are you aware that Express Scripts represented in
9 affidavits to this Court that it wasn't a big deal because
10 the pharmacy tool would lead patients right to Village
11 Pharmacy in Syosset?

12 MS. HELLMAN: Objection, Your Honor. She is
13 mischaracterizing the testimonying that's before this Court.

14 MS. CLARK: I don't think so, Your Honor, but
15 I'll --

16 THE COURT: Sustained.

17 Q Are you aware that Express Scripts suggested that
18 patients don't have a problem by virtue of losing their
19 pharmacy because they could always go to Village Pharmacy in
20 Syosset?

21 A I don't think we ever mentioned Village Pharmacy in
22 Syosset.

23 Q Does Express Scripts follow any patient abandonment
24 standards when it decides to summarily terminate a pharmacy
25 without making any other arrangements beforehand for

1 patients?

2 A I'm not familiar with patient abandonment standards.

3 Q Does Express Scripts have a pharmacy that could
4 prescribe narcotics and some of the highly regulated drugs
5 we've been talking about today, like fentanyl?

6 A Yes. Yes, Express Scripts mail order pharmacies can
7 dispense those types of medications.

8 Q Do you know how many patients that were Linden Care
9 patients had been shifted over to the Express Scripts mail
10 order pharmacy as a result of the termination of Linden Care?

11 A Not, I do not.

12 Q Would you be able to find that information out if you
13 wanted to?

14 A I suppose there could be some research done on that.

15 Q Do you know if there was any outreach to the Linden Care
16 patients trying to get them to go over to the Express Scripts
17 mail order service?

18 A I'm not aware of any.

19 THE COURT: Are we close to wrapping up, Ms. Clark?

20 MS. CLARK: Yes, Your Honor. As a matter of fact,
21 Your Honor, I have nothing more.

22 THE COURT: Ms. Roberts, with respect to the
23 exhibit that's been submitted about individuals in
24 California, I want to make sure I understand the exhibit. Is
25 there any evidence regarding where the shipments were made

1 to?

2 THE WITNESS: I don't know that we would have that
3 information. Linden Care would have that information.

4 THE COURT: So these were drugs that were provided
5 to members who had residence in California but there is no
6 evidence that you have regarding where the shipments were
7 made to?

8 THE WITNESS: Yes, ma'am.

9 THE COURT: And does Express Scripts have any
10 evidence that Linden Care was not making the best effort to
11 dispense the formulary drugs?

12 THE WITNESS: No, we do not have any evidence that
13 I'm aware of.

14 THE COURT: Thank you, Ms. Roberts. Anything
15 further, Ms. Hellman?

16 MS. HELLMAN: No, Your Honor. Thank you.

17 THE COURT: Thank you, Ms. Roberts. At this point
18 I assume we will continue Monday morning. The Court has to
19 be completed by noon on Monday, so I can start at 9:00. And
20 what do counsel intend to do on Monday? Do you have any
21 additional evidence?

22 MS. HELLMAN: Well, Your Honor, as we mentioned, we
23 would like an opportunity to question Mr. Weiner.

24 MS. CLARK: And, Your Honor, we would like an
25 opportunity to question somebody with Express Scripts with

1 knowledge regarding the issues here. I don't think I should
2 be forced to put up a third witness when Express Scripts have
3 come in with one witness, with a relevant range of knowledge,
4 but certainly not a complete range of knowledge. That
5 doesn't seem fair under the circumstances.

6 So, you know, I'm willing to -- I'm willing to rest
7 with the exception of Mr. Kantor, with a very narrow set of
8 issues, but unless this Court directs us otherwise, we would
9 not be bringing Mr. Weiner back to Court without some kind of
10 additional participation by witnesses with knowledge.

11 THE COURT: He did submit a declaration, so it
12 seems only fair that defense counsel should have an
13 opportunity to cross-examine him. We can check to see
14 whether we can do that by videotape. Make him available.
15 This Court has videotape facilities, if he was available to
16 testify by videotape, we could perhaps to do that on Monday
17 morning.

18 MS. HELLMAN: We would be open to that, Your Honor.
19 Thank you.

20 MS. CLARK: I'll have to talk to my clients about
21 that and see if they're comfortable with the videotape idea
22 but we appreciate that.

23 THE COURT: Video conference. My deputy corrected
24 me.

25 MS. HELLMAN: Is he here in New York? I mean, is

1 he in New York?

2 MS. CLARK: Not up here. He is in Manhattan. He
3 spent the whole -- he is not local, that's for sure. He is
4 not within 100 miles of the court, Your Honor.

5 MS. HELLMAN: I understand that. It's a pharmacy,
6 nobody's up here.

7 MR. SMITH: He chose his venue.

8 MS. CLARK: We're not complaining. We brought our
9 executives here. They testified in good faith about the
10 issues. They did not deny knowledge about everything that
11 Mr. Weiner put in his affidavit. They could have testified
12 about all those issues that were there. We just wanted to
13 provide the people with the information that was relevant to
14 the Court. And now they want somebody else who has really
15 got the same range of information. So I think that's --

16 MS. HELLMAN: Your Honor, I think the witnesses
17 that testified today actually have very little information as
18 evidenced by the compliance officer. It is their burden
19 here. So I don't think each party has to bring the same
20 number of witnesses. As long as it's by videotape, we're
21 agreeable to that, and I appreciate it, Your Honor.

22 THE COURT: I'm not sure exactly how we can do it
23 by video conferencing, now that it's after five, to arrange
24 for it. I'm wondering if perhaps we should continue it on
25 Tuesday and have it so that we have time to arrange for video

1 conferencing of Mr. Weiner, and then Ms. Clark can request a
2 witness from Express Scripts to testify.

3 MS. CLARK: Your Honor, I'm going to see if I can
4 get my client here on Monday. We are in a very difficult
5 situation with hundreds of thousands of dollars per day being
6 used to support patients.

7 Your Honor, I hate to indulge any more, but with
8 the testimony that we just heard regarding the basis for the
9 California issue and the testimony today, I really have no
10 choice but to ask that Your Honor consider a very narrow TRO.
11 We're happy to come back Monday, Tuesday, whenever you want,
12 but at this point, Your Honor, we feel like we've met the
13 burden that the Court has set for us and gone above and
14 beyond, and there is so much at stake for the patients, so we
15 are asking that the Court consider a very narrow TRO over the
16 weekend until we come back here.

17 THE COURT: I understand. And at this point that's
18 denied because I don't have enough information before me to
19 establish likelihood of success and irreparable harm to make
20 a ruling in favor of the TRO.

21 Let me ask, Ms. Hellman, is there some evidence
22 that shipments were sent to California?

23 MS. HELLMAN: I believe that, and I was somewhat
24 surprised, yeah, I can sure that up and we'll present that
25 evidence. So, yes, I do believe there is evidence of that.

1 The converse to say that they were on vacation, which I don't
2 believe that to be the case. Yes, I can do that and come
3 back here and if necessary we'll address that.

4 MS. CLARK: I believe the testimony was that people
5 that are on vacation, people that are recently relocated.
6 There was a couple different things there, it wasn't quite as
7 simple as vacationers. We just got hit with this information
8 today. Looks like a very logical explanation. But certainly
9 something that Express Scripts should have chased down before
10 they terminated us without notice, that's the point.

11 MS. HELLMAN: And, Your Honor, again, I would just
12 reiterate about whether it would be Monday morning or
13 whatever, I mean, again, we have heard so much evidence
14 today, but what we haven't heard is about the standard and
15 the burden that the plaintiff has, so if you would just again
16 indulge me a little bit to have some time to kind of go
17 through what the standards are and kind of address some
18 questions on irreparable harm.

19 THE COURT: Yes. Should we continue starting at
20 9 a.m. on Monday? Will Mr. Weiner be here?

21 MS. CLARK: I have to talk to him just for a
22 moment. May I?

23 THE COURT: Yes.

24 MS. CLARK: Your Honor, I did consult with my
25 client, and if we could, we don't think there is a lot of

1 testimony left, but the earliest flights won't get in here
2 before ten, even if he leaves at like pretty early in the
3 morning. So we can start then, that would be fine.

4 MS. HELLMAN: I know, I sympathize with flights.
5 We fly in the night before to be here. Again, the plaintiff
6 chose this venue, they chose to be here in the Northern
7 District of New York. So starting at ten, if you need to be
8 done by noon, Your Honor, I just feel we could be in the same
9 predicament we're in now.

10 THE COURT: Is there any other witness that the
11 either counsel intend to present on Monday?

12 MS. CLARK: I think what I'm going to be able to do
13 is cancel Mr. Kantor and substitute Mr. Weiner and have one
14 witness, because they have similar information. So I'm going
15 to try to do that and have one witness.

16 MS. HELLMAN: Are you reopening your case or have
17 you closed your case?

18 MS. CLARK: I did not close my case.

19 THE COURT: Perhaps we could meet at nine and have
20 some discussion on the legal issues that are before the
21 Court, and then following the testimony have argument about
22 the case. But I have some questions about the different
23 provisions that are before the Court and the state law. So
24 perhaps we could meet at 9:00 for that discussion. And then
25 if Mr. Weiner is here by ten, he could be the witness at

1 10:00.

2 MS. CLARK: That's fine, Your Honor.

3 MS. HELLMAN: That's fine.

4 THE COURT: Thank you, Counsel. See you Monday
5 morning.

6 * * *

C E R T I F I C A T I O N

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